88-643

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands corporation,

Petitioner,

v.

THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS, PATRICK M. RICE, EXECUTIVE DIRECTOR OF THE PUBLIC SERVICES COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does action taken as a result of lawful reliance upon a lower court's judgment granting a permanent injunction, coupled with respondent's failure to seek a stay, render an appeal moot?

2. Can the power of the Virgin Islands' Public Services Commission to regulate the sale of a utility's stock by an existing shareholder to a prospective shareholder be inferred from the Virgin Islands enabling legislation 30 V.I.C. §§ 1 through 44?

3. Does the Virgin Islands pre-amendment legislation governing utility regulation, as interpreted by the Third Circuit to apply to the sale of utility stock from one non-utility to another non-utility, constitute an impermissible restraint on interstate commerce under the principles set forth in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Atlantic Tele-Network Co., a Virgin Islands corporation, the Appellants below, and the Respondents herein, the Public Services Commission of the Virgin Islands and Patrick M. Rice, its Executive Director. As a result of the District Court's decision, the Petitioner owns all the outstanding stock of (i) the Virgin Islands Telephone Corporation and (ii) VitelCom, Inc. Forty-five percent (45%) of Petitioner's stock is issued to E.F. Hutton LBO, Inc., a subsidiary of E.F. Hutton Group, Inc. which has been acquired by Shearson Lehman Brothers, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

I. THE DENIAL OF DUE PROCESS TO A REGULATED TERRITORIAL UTILITY BY THE TERRITORIAL REGULATORY BOARD PRESENTS A NEW AND IMPORTANT QUESTION AFFECTING INTERNATIONAL RELATIONS 11

II. THE INFERENCE OF JURISDICTION IS DANGEROUSLY AND IMPERMISSIBLY OVERBROAD, CONFLICTS WITH SUPREME COURT PRECEDENT AND CANNOT BE RECONCILED WITH WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION 16

III. THE THIRD CIRCUIT VIOLATED JURISDICTIONAL RULES BY DECIDING A MOOT CASE 22

IV. APPLICATION OF THE PRE-AMENDMENT STATUTORY SCHEME TO THE OWNER'S SALE OF THE UTILITY'S STOCK IS INVALIDATED BY THE COMMERCE CLAUSE 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alejandrino v. Quezan, 271 U.S. 528, 535 (1926) 24

American Book Co. v. Kansas, 193 U.S. 49, 51-52 (1904) 24

Board of Governors v. Dimension Fin., 474 U.S. 361 (1986) 16, 21

Chesapeake and Potomic Telephone Company v. Manning, 186 U.S. 238 (1902) 19

Chevron U.S.C. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984) 18

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 534, n. 1, 100 S.Ct. 2326, 2331, n. 1, 65 L.Ed.2d 319 (1980) 28

CTS Corp. v. Dynamics Corp. of America, 107 S.Ct. 1637, 1649-51 (1987) 26

Earle, et al. v. McVeigh, 91 U.S. 503 (1875) 23

Edgar v. Mite Corp., 457 U.S. 624 (1982) .. 25, 26, 27, 29

Honig v. Students of Cal. School For Blind, 471 U.S. 148 (1985) 24

Howe v. Smith, 452 U.S. 473, 483 (1981) 18

Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837 (1st Cir., 1988) 26

Insurance Corp. v. Compagnee Des Bauxites, 456 U.S. 694 (1982) 18, 23

JDS Realty Corp. v. Government of the Virgin Islands, 824 F.2d 256, 260 (3rd Cir., 1987), 108 S.Ct. 687 (1988), *rev. & rem. on other grounds* 26

TABLE OF AUTHORITIES–Continued

Page

Jordan v. DeGeorge, 341 U.S. 223, *reh. den*, 341 U.S. 956 (1951) 20

Keyishian v. Board of Regents, 385 U.S. 675 (1987)..... 20

Lewis v. U.S., 445 U.S. 55, 65 (1980) 20

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 16, 19, 21

Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 276 (1923) 27

Oil Workers Unions v. Missouri, 361 U.S. 363 (1960) 24

Pacific Gas & Electric v. P.U.C. of California, 106 S.Ct. 903 (1986)..... 28

Pike v. Bruce Church Inc., 397 U.S. 137 (1970) 26

Roe v. Wade, 410 U.S. 113, 125 (1973)..... 24

Standard Oil Co. v. Missouri, 224 U.S. 270, 280-281 (1912) 23

State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company, 291 Ill. 209, 234..... 27

U.S. v. Apfelbaum, 445 U.S. 115, 121 (1980) 18

U.S. v. Turkette, 452 U.S. 576, 580 (1981)..... 18

STATUTES

28 U.S.C. §1291..... 2

28 U.S.C. §1254(1) 2

48 U.S.C. §1612..... 2

TABLE OF AUTHORITIES–Continued

Page

Section 22 of the Virgin Islands' Revised Organic Act of 1954 2

30 Virgin Islands Code §1 ..... 10, 17

30 Virgin Islands Code §2 17

30 Virgin Islands Code §41 ..... 18, 23

30 Virgin Islands Code §42 ..... 3, 19

Virgin Islands Legislative Bill, No. 1039 ..... 1, 19

30 V.I.C. §36 24

Virgin Islands Government in Sunshine Act, 1 V.I.C. §§251-256 12

OTHER

Senate Hearing No. 98-159, 6/10/83 15

Rule 62 of the Federal Rules of Civil Procedures 24, 25

Public Services Commission Order 25-1987 6

Regulatory Focus, Major Rate Cases, January 1980 - December, 1987 14

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THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS, PATRICK M. RICE, EXECUTIVE DIRECTOR OF THE PUBLIC SERVICES COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Atlantic Tele-Network Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit. The opinion was filed March 10, 1988, and a timely filed petition for rehearing and suggestion of rehearing en banc was denied on July 18, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, No. 87-3485, reversing the District Court, is reported at 841 F.2d 70 (1988), and is reprinted in the appendix hereto, pp. 1a through 10a.

The decision of the United States District Court of the Virgin Islands, Division of St. Thomas and St. John, rendered by the Honorable Almeric L. Christian, has not been reported. The official transcript of the judge's decision rendered June 19, 1987, and the Court's order is reprinted in the appendix hereto, pp. 11a through 27a.

JURISDICTION

Invoking jurisdiction under Section 22 of the Virgin Islands' Revised Organic Act of 1954, 48 U.S.C. § 1612, the Petitioner brought this suit in the District Court of the Virgin Islands. On June 5, 1987, Petitioner moved for summary judgement on the second, third and fifth causes of action. On June 19, 1987, the District Court granted Petitioner's motion for summary judgment of the third cause of action and granted a permanent injunction against the Public Service Commission's interference with the consummation of the sale.

On Respondent's timely appeal, the Third Circuit having jurisdiction under 28 U.S.C. § 1291, heard oral arguments and rendered an opinion dated March 10, 1988, reversing the judgment of the District Court and remanding the case for further proceedings. Petitioner's petition for rehearing and suggestions of rehearing en banc, filed March 23, 1988, was denied on July 18, 1988.

The jurisdiction of the Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of Title 30, Chapter 1, Subchapter I, of the Virgin Islands Code ("V.I.C.").

Applicable sections of Title 30, Chapter 1 of the Virgin Islands Code are set forth in the Appendix hereto, pp. 39a through 49a.

Act No. 5258 passed by the Seventeenth Legislature of the Virgin Islands of the United States is set forth in the Appendix hereto, pp. 50a through 52a.

STATEMENT OF THE CASE

ITT Corporation (hereinafter ITT Corporation and its subsidiaries are collectively referred to as "ITT") purchased the telephone system from the Virgin Islands Government in 1959. The sale of the telephone company to ITT and the issuance of the franchise agreement was approved by the Virgin Islands Legislature as part of the same bill, No. 1039, which became effective October 9, 1959. On October 30, 1959, the Virgin Islands Government executed the franchise agreement for the telephone company and a sale agreement was executed with ITT. The franchise agreement restricts the transfer of the franchise. The sale agreement provided there could be no transfer of the telephone company stock by ITT for a period of *five* years.[1]

In January, 1986, Jeffrey J. Prosser ("Prosser"), now an owner of 27 1/2% of Petitioner's outstanding stock,

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[1] 30 V.I.C. § 42 provides that nothing contained in the chapter setting forth the statutory scheme to regulate utilities shall be construed to alter or amend the terms of any contract or franchise entered into prior to January 1, 1965.

commenced negotiations with ITT regarding the acquisition of the stock of the Virgin Islands Telephone Corporation ("Vitelco"), the last local telephone exchange operated by ITT.

Vitelco was a company with no debt. For regulatory purposes the PSC used a hypothetical capital structure treating Vitelco as if it had a 55/45 debt to equity ratio.

After negotiations resulted in agreement upon price and basic terms, in August, 1986, ITT informed the then Governor of the Virgin Islands of the possible sale of the Vitelco stock.

On August 21, 1986, a preliminary agreement regarding the sale of the Vitelco stock was entered into with ITT. The ITT Board of Directors approved the preliminary agreement on September 9, 1986.

On or about September 11, 1986, the Virgin Islands Public Services Commission ("PSC") was notified of the impending sale.

At that time, there was no statute which expressly gave the PSC regulatory authority over the sale of a utility's stock by a shareholder to a prospective shareholder. The PSC regulations contain no provision that provides for any notice or application process to the PSC for a stock sale. In fact, the ownership of Vitelco's stock changed several times from one ITT subsidiary to another between 1959 and 1986 without PSC approval.

In November, 1986, all required Federal Communication Commission ("FCC") applications were filed. The principals of Petitioner were Prosser, Edmund Blankenau ("Blankenau"), Craig Swoboda ("Swoboda"), and Mid-America Communications Company, a corporation indirectly controlled by Blankenau and Swoboda.

On January 9, 1987, the final contract was executed between Petitioner and ITT. The contract required closing on or before February 15, 1987.

The PSC scheduled its first hearing on the sale of Vitelco stock for January 23, 1987, and gave Petitioner notice of such hearing on or about January 12, 1987.

The FCC approved the change in control in January, 1987.

The principals and representatives of Petitioner attended PSC meetings held on January 23, February 5, and February 21 of 1987. At all times Petitioner's principals and representatives contested the exercise of jurisdiction by the PSC.

On April 1, 1987, there was a change in the principals of Petitioner. Thereafter, the principals of Petitioner were Prosser, Cornelius B. Prior, Jr. ("Prior"), a then Managing Director of Kidder, Peabody & Co., who headed the firm's Telecommunications Finance Group, and E.F. Hutton LBO, Inc., a subsidiary of E.F. Hutton Group, Inc. ("collectively referred to as "Hutton"). The PSC was informed of the change in principals at its April 2, 1987, PSC hearing.

The previous hearings, January 23rd, February 5th, and February 21st, involved proposed financing by The First National Bank of Chicago which was a loan with a weighted average life of four and one-half years. With Hutton, the financing plan changed to a short-term bridge loan provided by Hutton which would be refunded by the sale of fifteen year bonds issued by Petitioner and preferred stock (the "Hutton Financing"). All information regarding the new financial proposal was provided to the PSC prior to the April 21, 1987, hearing.

On April 21, 1987, the PSC held its final and only hearing on the Hutton Financing. It was at this meeting that the PSC authorized the issuance of PSC Order No. 22-1987 (the "Order") which was dated April 23, 1987. This Order is the subject matter of this controversy. The only financing proposal which is the subject matter of the Order is the Hutton Financing. The Order is reprinted in the Appendix hereto, pp. 30a through 38a.

The final paragraph of the Order provided:

> "Providing all the terms of this order are met by ATN, ITT and Vitelco, and compliance with the terms hereof are certified in writing to the Commission and

> *confirmed by the Commissions staff*, the proposed sale of stock by ITT to ATN may proceed." (Emphasis Added)

The PSC's Chief Counsel, Maria T. Hodge, Esq. and Jamshed K. Madan, the PSC's Chief Consultant, act in the capacity of the Commission's staff.

Petitioner attempted to comply with the Order. After having extensive conversations with the Commission's staff, Petitioner made two separate submissions, one on May 7th and the second revised submission on May 15th intending to comply with the Order. Notwithstanding making substantial changes pursuant to the directions of the PSC's Chief Counsel's, Maria Hodge, Petitioner's second submission was not confirmed by the PSC's staff.

On May 18th, the legislature of the Virgin Islands passed Act No. 5258 giving the PSC statutory jurisdiction over the sale of a utility stock. The Governor of the Virgin Islands signed the bill into law on May 19, 1987. This bill is broad enough that it restricts the public utility from transferring even a single share on its books and records, unless authorized by the PSC.

After the new legislation, in lieu of confirming Petitioner's compliance with the Order, the PSC scheduled a May 22, 1987, meeting without the proper statutory notice. Since Petitioner refused to waive the statutory notice this meeting was rescheduled for June 9, 1987. The order, No. 25-1987, scheduling the new meeting is set forth in the Appendix hereto, p. 57a.[2]

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[2] The Third Circuit decision stated "Five days later, ATN filed a petition for reconsideration of the PSC's April 23, order . . . The PSC scheduled a hearing on this petition . . . " 841 F.2d at 72. This is a distortion of facts to make it appear the PSC was proceeding within the bounds of due process. Rather, ATN's willingness to comply with the Order surprised the PSC. After the new law was passed the PSC tried, without notice, to schedule a meeting May 22. ATN, the petitioner, did

(Continued on following page)

On May 22, 1987, Petitioner filed a motion for reconsideration of the Order.

On June 2, 1987, the Petitioner filed this action as a declaratory judgement action which collaterally attacked the PSC's jurisdiction and the Order.[3] The complaint consisted of five separate causes of action including the first cause of action which alleged compliance with the Order and requested relief in the form of the Court ordering the Commission's staff to confirm Petitioner's compliance with the Order.

ITT is not a party to the case.

On June 5, 1987, the Petitioner moved for summary judgment on the second, third and fifth causes of action set forth in the Petition. For the limited purposes of Petitioner's motion, the findings of fact set forth in the Order were accepted as correct.[4] After permitting both sides to brief and argue the motion for summary judgment, on June 19, 1987, announcing his decision in open court, the Honorable Almeric L. Christian, Chief Judge, ruled in favor of the Petitioner's motion for summary judgment. The Judge held:

> "In closing, I would make clear what has been today decided. Nothing here said speaks to the powers of the PSC to regulate once the same has been consummated, if it is consummated and whatever be

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not file a motion for reconsideration until May 22. Why the attempted May 22 meeting? The only apparent purpose was to unilaterally (on its own motion) withdraw the Order and issue a new order with more onerous provisions. In no case could the May 22 hearing, subsequently moved to June 9th, been for the purpose of dealing with Petitioner's motion for reconsideration since that motion was not filed until May 22, 1987.

[3] The Order as of this date is not final. It is being contested in separate litigation captioned *Atlantic Tele-Network Co. v. Public Services Commission of the Virgin Islands*, Civil No. 87-347.

[4] See Footnote No. 3.

> the basis of such consummation. Nor is the amendment declared invalid. This court holds no more than that under existing law, as is obtained prior to the May 1987 amendment the PSC was not empowered to grant or withhold it's approval to a sale of a public utility. Therefore, it could not lawfully impose conditions on such a sale. We hold also that Act No. 5258 may not be applied to the contract with which we are concerned in this instant matter, for to do so, would be to run afoul of the Contract Clause of the Constitution of the United States, extended to this territory by the Revised Organic Act of the Virgin Islands."

See transcript of the Judge's decision read in open court which is set forth in the Appendix hereto, pp. 11a through 25a.

On June 24, 1987, relying upon the opinion of the Chief Judge of the District Court, and relying upon the failure of the PSC to seek a stay from the Third Circuit Court of Appeals, Petitioner acquired the Vitelco stock from ITT. Consummation of the transaction required in excess of Ninety Million Dollars ($90,000,000). The contract expired February 15, 1987, and Petitioner's last extension of the contract expired June 20, 1987.

On December 29, 1987, relying upon the unstayed judgment of the District Court, Petitioner entered into a 15 year loan with the Rural Telephone Financing Corporation ("RTFC"). As part of that loan, as in the case of any financing agreement, Petitioner pledged the assets of Vitelco as collateral. The proceeds of this loan were used to retire the loan from Hutton.

Petitioner formed a new entity to conduct deregulated activities, VitelCom, Inc., and many of Vitelco's assets engaged in deregulated business were transferred thereto.

Though facts were not an issue in the Motion for Summary Judgement, the PSC, before the Third Circuit, engaged in a factual argument to persuade the Third

Circuit that jurisdiction was in the "public interest." Respondent's briefs were replete with errors:

(i) characterizing as admissions statements which were not admissions;

(ii) submitting irrelevant data as relevant;

(iii) omitting relevant data necessary for a fair presentation of the facts; and

(iv) distorting the facts.

Since facts were not in issue or relevant to the nature of the Motion, Petitioner ignored Respondent's factual arguments.

As example only, and not by any means a limitation, Swoboda made the statement set forth in the Appendix hereto, pp. 62a through 69a, in an attempt to avoid confrontation and commence negotiations of Petitioner's differences with the PSC staff. However, in Respondent's briefs before the Third Circuit the statements, which were not admissions, were presented as admissions against Petitioner's interest. See the Appendix hereto, pp. 59a to 61a. Note that Swoboda was not a principal or agent of Petitioner after April 1, 1987, and the First Chicago financing proposal, the subject matter of the February 5, 1987, hearing and the Swoboda statement, was *not* the proposed financing that was the subject matter of PSC Order No. 22-1987. Yet, Respondent's counsel states in her brief to the Third Circuit that Petitioner agreed the proposed financing would be detrimental to ratepayers, implying, if not misrepresenting, that the statement was about the Hutton Financing that is the subject of PSC Order No. 22-1987 and this case.

Apparently, compelled by the need for jurisdiction or, as stated in page 8 of the Third Circuit's decision " . . . if the sale of a utility's stock is proposed on terms that the PSC concludes will deprive the utility of such

financial stability, it *must* be able to act effectively[5], . . . " (Emphasis Added) the Third Circuit found:

> (i) "Vitelco is a public utility." 30 VIC § 1(a)(3)(1976). *See* 841 F.2d at 73.
>
> (ii) "Although we agree that the PSC has no authority to regulate the conduct of Petitioner or ITT per se, . . . " [since neither is a public utility within the meaning of 30 VIC § 1(a)(3)(1976)]. *See, Id.* bracketed language added.
>
> (iii) "Although no statutory provision enacted before the May 1987, amendment explicitly gives the PSC the power to regulate the sale of a utility's stock, this power must be inferred from the pre-amendment statutory scheme." *See, Id.*

Concluding that the pre-amendment statutory scheme granted jurisdiction, the Third Circuit concluded that it was unnecessary to review whether the statutory amendment to the sale would violate the "Contract Clause" if applied to the Petitioner's acquisition of the Vitelco stock from ITT. The Third Circuit reversed the judgment of the district court and remanded the case for further proceeding.

On March 23, 1988, Petitioner filed a Petition for Rehearing and Suggestion of Rehearing En Banc. On July 18, 1988, the Third Circuit denied petitioner's motion.

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[5] The Third Circuit failed to examine the statutory scheme for the broad authority the PSC could exercise over Vitelco after the sale to protect ratepayers.

REASONS FOR GRANTING THE WRIT

I.

THE DENIAL OF DUE PROCESS TO A REGULATED TERRITORIAL UTILITY BY THE TERRITORIAL REGULATORY BOARD PRESENTS A NEW AND IMPORTANT QUESTION AFFECTING INTERNATIONAL RELATIONS.

The PSC cloaked its proceedings with the appearance of due process by holding hearings pursuant to notice to the affected parties. Behind this facade, however, the PSC has deprived Petitioner of due process by, among other things,

1) Abusing its scheduling power by scheduling its first public hearing January 23, 1987, some four months after it was first notified of the proposed stock sale;

2) requiring Petitioner to provide information concerning a transaction over which the PSC has no authority;

3) causing Petitioner to incur unnecessary and excessive costs because of delays in the sale caused by the PSC proceedings and the presentation of voluminous information to the PSC in those proceedings;

4) jeopardizing the acquisition of the Vitelco stock[6];

5) requiring the voluntary submission of all Vitelco deregulated activities and all of Petitioner's activities to PSC regulation as a prerequisite to a negotiated settlement;

6) placing restrictions upon the transfer of Vitelco stock from ITT to Petitioner without statutory authority to do so;

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[6] The original contract required closing on or before February 15, 1987. ITT granted several extensions but not without extracting interest. When the transaction closed on June 24, 1987, there was no formal extension of the contract which bound ITT to sell the Vitelco stock to Petitioner. Petitioner paid interest to ITT because of the delayed closing in excess of a million dollars.

7) setting forth conditions under which it would approve the sale of stock by ITT and then rejecting Petitioner's attempts to comply with those conditions;

8) violating the Virgin Islands Government in the Sunshine Act, 1 V.I.C. §§ 251-256, by holding non-public meetings to discuss the sale and by declaring executive sessions to debate and decide its orders[7];

9) demanding Petitioner waive its right to appeal the Order, No. 22-1987 dated April 23, 1987, placing the conditions on the ITT stock sale in return for PSC approval of ATN's compliance with the Order; and

10) when Petitioner refused to waive its right to appeal, lobbying the legislature through the PSC's Chief Counsel for an ex post facto statute authorizing the PSC to block the sale.

Perhaps the most glaring example of this abuse of power however is the conflicting roles played by the PSC's Chief Counsel, Maria T. Hodge, and the PSC's primary consultant, Jamshed Madan. During the course of the proceedings, they acted in the following capacities, (i) as the prosecutor and chief advocate against the acquisition, (ii) as the agents for the PSC in all negotiations with Petitioner, (iii) as the PSC's staff (delegated the power to confirm Petitioner's compliance with the Order), and (iv) as a member of the PSC by participating in executive sessions while Petitioner representatives were excluded.

During the appeal of this case to the Third Circuit the denial of due process continued unabated. For example,

1) when Vitelco responded to a PSC petition to decrease rates with a request for rate increase, the PSC

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[7] ATN's principals and agents did not know the content of the Order, No. 22-1987, until they received it because the content of the Order was debated and decided upon in executive session. The decision in the public meeting was to approve the PSC's decision made in executive session. See Appendix pp. 53a through 56a.

used its powers to bifurcate the rate decrease (Docket 314) from the rate increase (Docket 316), proceeding simultaneously with the intent to deny Vitelco the benefit of a 1985 settlement specifying the return on rate base for the next rate proceeding[8];

2) the PSC's Chief Counsel in the appeal engaged factual distortions to persuade the Third Circuit that the sale by ITT of Vitelco stock was not in the public interest[9]; and

3) the PSC's power was being used to accomplish objectives not within its power by offering to settle all outstanding matters if (i) Prosser and Prior would resign, (ii) if Petitioner would consent to regulation, and (iii) if all deregulated businesses of Vitelco would submit to regulation.

Since the Third Circuit's decision in this case, the PSC has become bolder and more open with its denial of due process. At the same time, it impeached its own arguments before the Third Circuit. The crux of the PSC's factual argument before the Third Circuit and of the "Order" was that the acquisition was not financially sound and that Vitelco would have to have huge rate increases to pay Petitioner's debt and to maintain Vitelco's level of service to the consumers. In fact, Vitelco has increased its capital expenditure program to

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[8] The 1985 rate case settlement specified the hypothetical capital structure and the return on rate base Vitelco would be allowed in the next rate case. By separating cases, the PSC could purport to use previously agreed upon assumptions for one case and then use the new docket to further reduce the return on rate base by changing the assumptions and methodology used to set rates in the second case. In effect, denying Vitelco benefit of the 1985 settlement.

[9] Petitioner ignored the distortion of the record to avoid being drawn into factual argument when the case involved purely issues of statutory interpretation.

approximately $10,000,000 a year while paying enough dividends to Petitioner to service the RTFC's debt. The PSC, instead of granting rate increases, used its two dockets to decrease Vitelco's revenue by approximately $4,200,000 (Arthur Anderson's certified financial statements show local service operating revenue for 1987 of $18,067,000). In effect, Vitelco was given a 5.634% after-tax return on rate base: lower than any other telephone rate case reported in *Regulatory Focus, Major Rate Cases, January 1980 – December 1987*, published by Regulatory Research Associates, Inc.[10] In addition, among other items, the PSC ordered Vitelco to hold all dividends in escrow until the resolution of Docket 301; the docket dealing with the acquisition. Petitioner's only source of capital that will permit Petitioner to fully service the debt to RTFC are the dividends from Vitelco.[11]

The PSC has interpreted the Third Circuit's decision as authorizing the PSC's jurisdiction over all the affairs of Petitioner. Further, a footnote in the Third Circuit's opinion mentioning rescission has been interpreted as authorizing rescission. This is a case and controversy with Vitelco facing an uncertain but litigious future.

The United States Virgin Islands are located in the Caribbean. President Reagan's Caribbean Basin Initiative recognizes the Caribbean as an area of strategic importance to the United States. The Honorable Ron DeLugo, a

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[10] Vitelco's growth in access lines has been at least an average of over six percent over the last five years (one of the highest in the nation) indicating Vitelco should be given a higher rate of return than other telephone companies. Further, when Vitelco was 100% capitalized the PSC used a hypothetical capital structure (55% debt, 45% equity) to set rates. Now the PSC changed rate setting methodology to look through to Petitioner and treat Vitelco as a capital structure of 100% debt.

[11] Query, was the purpose for the legitimate public interest?

delegate from the Virgin Islands, stated before the Senate's Committee On Energy and Natural Resources, with respect to the Caribbean Basin Initiative that:

> "These islands in the Eastern Caribbean are closely tied to the U.S. Virgin Islands. We share a common history and culture. . . . For our neighboring islands, the U.S. Virgin Islands *is* the United States." *S. Hearing*, 98-159, June 10, 1983, pp. 14-15.

In the appendix to the Senate report, in response to questions on the economic problems in the Virgin Islands, it was reported:

> "The most pressing economic problems in the Virgin Islands today are insufficient industrial development and insufficient revenues to meet pressing infrastructure needs, such as water and power and the local share of the St. Thomas airport project.
>
> Despite the tax and customs advantages offered to attract businesses to the Virgin Islands, we have not been able to supplant the Government of the Virgin Islands as the major local employer. Industry avoids locating in the Virgin Islands because of the high water and power costs, the unreliability of these utilities, and the high shipping costs from the Virgin Islands." *S. Hearing*, 98-159, June 10, 1983, p. 104.

The 1980 census information lends support to the above statements. Out of a 1980 employed work force of 35,652, the local government employed 10,480 (29.4%) and the federal government employed 1,618 (4.54%) for a combined government employment of 12,098 or 33.93% of the employed work force in the Virgin Islands.

The Virgin Islands two critical problems are the lack of insufficient private employment and a weak infrastructure. Vitelco, a wholly owned subsidiary of Petitioner, is the second largest employer and an important element of the Virgin Islands infrastructure. This controversy threatens an element of the infrastructure that the Virgin Islands should be promoting – the role of the private

investor in providing private utilities.[12] Secondly, the abuse of due process distorts the perception of the private investors role in our economy to all the nations of the Caribbean.

In sanctioning this abuse of power by the PSC, the Third Circuit Court of Appeals committed errors so grave as to endanger the perception of democracy in the Caribbean.

II.

THE INFERENCE OF JURISDICTION IS DANGEROUSLY AND IMPERMISSIBLY OVERBROAD, CONFLICTS WITH SUPREME COURT PRECEDENT AND CANNOT BE RECONCILED WITH WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

As a summary, the District Court held:

(i) that Act No. 5258, granting the PSC jurisdiction over the sale of Vitelco Stock could not be applied in this case of ATN's acquisition or the Contract Clause of Constitution would be violated; and

(ii) the PSC had no jurisdiction over the sale under the pre-amendment statutory scheme.

The Third Circuit found that power over the sale " . . . must be inferred from the pre-amendment statutory scheme." The Third Circuit vacated the judgment and remanded the case.

The Third Circuit's decision is in direct and apparent conflict with prior Supreme Court precedent, *Board of Governors v. Dimension Fin.*, 474 U.S. 361 (1986), and *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986), which struck down result-oriented decisions.

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[12] Many nations of the Caribbean are experimenting in some form of privatization of their respective utilities. The rule of law established by the Third Circuit's decision indicates that the United States discourages the present trend toward privatization efforts that are currently widespread in the Caribbean.

A review of Title 30, Chapter One, Subchapter I of the Virgin Islands Code ("V.I.C.") sets forth in plain, unambiguous language a statutory scheme granting jurisdiction over the services and facilities of public utilities and charging the PSC with the jurisdiction to control rates, services, and the manner of delivery of those services. The key provisions are:

§ 1. Public utilities subject to regulation; definition; financial interests of members of Commission

(a) The following services provided by an individual, firm, co-partnership, association, corporation or other person for compensation are declared to be affected with a public interest and are defined to be a public utility subject to this chapter, and the person providing such service to be a 'public utility'.

(1) lighterage and cargo handling;

(2) dockage, wharfage, or related cargo services;

(3) telephone service;

(4) water supply services; except retail deliveries;

(5) electric power service;

(6) passenger services by motor busses or trucks;

(7) public marine passenger transportation services operating under government grant of exclusive franchise.

§ 2. Just and reasonable rates and services

Every public utility doing business within the Virgin Islands is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished, or rendered, shall be reasonable, just and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the Commission.

§ 41. Liberal interpretation

> . . . The Commission hereby created shall have, in addition to the powers in this chapter specified, mentioned, and indicated all additional, implied and incidental power which may be proper and necessary to effect and carry out, perform and execute all said powers herein specified, mentioned and indicated. . . .

With respect to the pre-amendment statutory scheme, the Third Circuit concluded:

> "Although no statutory provision enacted before the May, 1987 amendment explicitly gives the PSC the power to regulate the sale of a utility's stock, this power must be inferred from the pre-amendment statutory scheme."[13] See p. 8a.

The Third Circuit ignored a well settled canon of statutory construction: a statute must be interpreted according to its plain language absent an ambiguity. *Chevron U.S.C. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984); *U.S. v. Apfelbaum*, 445 U.S. 115, 121 (1980); *U.S. v. Turkette*, 452 U.S. 576, 580 (1981); *Howe v. Smith*, 452 U.S. 473, 483 (1981). The Third Circuit found no such ambiguity. Interpretation should have then ended with the plain language of the statute.

In addition, the Third Circuit acknowledged, "Although we agree that the PSC has no authority to regulate the conduct of ATN or ITT per se, . . . ".[14] The Third Circuit ignored well founded requirements of due process that there must be both subject matter jurisdiction and jurisdiction over the person before a court may decide a case. *Insurance Corp. v. Compagnee Des Bauxites*, 456 U.S. 694 (1982). The pre-amendment statutory scheme

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[13] The Third Circuit concedes that the statutory schemes does not provide jurisdiction of the subject matter, a stock sale, and that the statutory scheme provides no jurisdiction over the person, ATN or ITT.

[14] See Footnote No. 14.

confers no jurisdiction over the sale of utility stock by its owner and no jurisdiction over Petitioner or ITT. It is a fundamental principle that an administrative agency may only exercise those powers granted to it by the legislature that created it. *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986). Jurisdiction cannot be inferred merely because the business is affected in part with public interest. In his opinion in *Chesapeake and Potomic Telephone Company v. Manning*, 186 U.S. 238 (1902), Justice Brewer stated:

> "Again, while a legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations with private capital and for private benefit, the language of such regulations will not be broadened by implication. In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter of the statute." *Id.* at 248.

The Virgin Islands Code, Title 30, supports Petitioner's proposition. The Code, and the PSC regulations are devoid of any procedure, forms, or standards regarding the sale of a utility stock.

The legislative history supports the District Court Judge's interpretation of the statutes. One legislative bill, No. 1039, effective October 9, 1959, authorized the sale of telephone company to ITT and the issuance of a franchise for the telephone company. The franchise agreement and sale agreement were exhibits to the legislative bill. Both were executed on the same day, October 30, 1959. The franchise agreement restricted its transfer. The sale agreement executed with ITT only restricted the sale of stock for five years.[15] The above demonstrates that the legislature

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[15] 30 V.I.C. § 42 provides that nothing contained in the chapter setting forth the statutory scheme to regulate utilities

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understood the difference between the transfer of a franchise and the sale of the utility's stock by its owner, electing to control only the former.

The action of the Virgin Islands Legislature in passing Act No. 5258, expressly giving the PSC jurisdiction over the sale of a utility's stock by its owner, supports Petitioner's interpretation of the pre-amendment statutory scheme. The transcript of the legislative proceedings in considering this Act reveal that the legislative counsel was of the opinion that, under the pre-amendment statutory scheme, the PSC did not have jurisdiction over a stock sale.

The provisions of the Title 30 of the Virgin Islands Code, the legislative history thereof and the actions, as well as the opinion, of the Seventh Legislature of the Virgin Islands of the United States all support the District Court's opinion that the PSC had no authority to approve, disapprove or otherwise condition the sale of a utility's stock by its owner. To conclude otherwise and assume the PSC had jurisdiction under these statutes would leave this statutory scheme lacking many critical elements in detailing proscribed conduct for parties such as the Petitioner. These statutes would then be highly susceptible to an argument that they are unconstitutionally vague under the due process clause. *Jordan v. DeGeorge*, 341 U.S. 223, *reh. den.*, 341 U.S. 956 (1951); *Keyishian v. Board of Regents*, 385 U.S. 675 (1967).

The fact that the Third Circuit would have to decide a constitutional issue, whether the new act can be applied in these facts, does not allow the Third Circuit to depart from the statute when its language is plain and unambiguous and when the legislative history supports its clear meaning. *Lewis v. U.S.*, 445 U.S. 55, 65 (1980).

(Continued from previous page)

shall be construed to alter or amend the terms of any contract or franchise entered into prior to January 1, 1965.

This result-oriented opinion[16] of the Third Circuit is in direct and apparent conflict with the cases cited above and the canons of statutory construction supported by numerous other Supreme Court decisions. Result oriented opinions, "however sound the result," are in direct and apparent conflict with the Supreme Court holding in *Board of Governors v. Dimension Fin.*, 474 U.S. 361 (1986), and *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986).

The Third Circuit has retroactively interpreted the Public Utilities Act (30 V.I.C. §§ 2, 4, 41) in a manner which is dangerously and impermissibly overbroad. The Third Circuit concluded the PSC "must" have this power though there was no examination of the PSC's extensive regulatory authority or of the ability of the PSC to protect the public interest without the inference of jurisdiction. The Third Circuit, without any statutory basis, extended the PSC's powers over the alienability of private property; a fundamental incident of ownership.

A review of state statutes reveal four basic categories addressing ownership or control of public utilities:

1) those which have no statute addressing ownership;

2) those directly prohibiting ownership by any person of more than a percentage of a public utility without prior approval of the PSC;

3) those prohibiting ownership of one public utility by another without prior PSC approval; and

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[16] The "public interest", expressed through the statutory scheme governing the PSC actions, is limited to the nature of services delivered, the safe delivery of those services, and reasonable pricing. To exercise its police powers, the PSC action must bear some relationship to those three areas. It is a legislative, in contrast to the judicial or PSC, prerogative to determine the required nexus before the PSC can exercise its police powers subject to constitutional guarantees.

4) those that may indirectly require PSC approval. By its instant decision – empowering the PSC to condition or prohibit a sale contrary to the plain language of the statutes – the Third Circuit rode roughshod over all of these carefully-honed criteria, standards, distinctions and definitions enacted by the various states. In consequence, the Third Circuit's decision is both fundamentally anomalous and of national significance, and should be reviewed by the Supreme Court.

The importance of Petitioner's subsidiary to the economy of the Virgin Islands coupled with a decision which cannot be reconciled with, either with the rules of statutory construction or Supreme Court precedence, suggests the Court's supervisory powers should be invoked.

III.

THE THIRD CIRCUIT VIOLATED JURISDICTIONAL RULES BY DECIDING A MOOT CASE.

A summary of relevant facts are:

(i) The PSC through several meetings sought to condition or prohibit closing of Petitioner's acquisition of Vitelco stock;

(ii) Petitioner filed an action for the declaratory judgment collaterally attacking PSC Order No. 22-1987;

(iii) ITT, the then owner of the utility stock, was not a party to the proceeding nor did the PSC move to make ITT a party;

(iv) Judge Christian ruled favorably and granted Petitioner's request for a permanent injunction against the PSC restricting interference with the transaction;

(v) The sale closed on June 24, 1987, before the Third Circuit ruled and before the case was argued;

(vi) The new law, Act No. 5258, is applicable to any future transfer since the law was not declared unconstitutional, it was decided only that it could not be constitutionally applied to this case; and

(vii) The Third Circuit ruled against Petitioner's motion to dismiss based upon mootness.

There is nothing in the Code, even as amended, which gives the PSC jurisdiction over the continuing ownership of a utility's stock. As amended, the Code gives the PSC jurisdiction only at a certain point of time: when utility stock is being sold. For instance, if ITT was still the owner of the stock of Vitelco, nothing in the Code, as amended, would give the PSC any jurisdiction over the utility's stock until ITT proposed a transfer of the stock.

The District Court cannot order rescission. ITT was not a party to the action before the District Court. Any court order of rescission must by necessity involve ITT, the seller of the stock. Respondent could have named ITT as a party to this case when it was at the District Court but Respondent did not so elect. Consequently, there is no jurisdiction of the person, ITT, a necessary requisite of due process to any order of rescission. *Insurance Corp. v. Compagnee Des Bauxites*, 456 U.S. 694, 701 (1982); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 280-281 (1912); *Earle, et al. v. McVeigh*, 91 U.S. 503 (1875).

The Third Circuit suggested that the PSC could charge a penalty under 30 V.I.C. § 41. This suggestion ignores the nature of the act. PSC sought to prevent closing without adherence to conditions. The Order provided, "ORDERED that any proposed sale of Vitelco stock by ITT to ATN, or to any other prospective purchaser, which includes any of the following terms and conditions, *shall not be consummated* and *is hereby prohibited*." (Emphasis Added) See p. 5 of the Order. Closing took place, not in violation of the Order, but after a then legally valid judgment and a grant of a permanent injunction. Since the closing took place while the District Court's order was still in effect, the PSC has no more right to penalize the Petitioner for its ownership of the Vitelco stock than it would have a right to penalize ITT if it still owned the stock.

The sale having taken place legally and the Court having no jurisdiction over ITT, no effective relief can be ordered by the Court. Since there is no case or controversy and no relief that can be ordered the Third Circuit should not have decided the case. *Honig v. Students of Cal. School For Blind*, 471 U.S. 148 (1985); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Oil Workers Unions v. Missouri*, 361 U.S. 363 (1960).

Even the Virgin Islands Code supports Petitioner's position. Section 36 provides that all PSC orders shall remain in full effect unless and until they are vacated by the lawful order of the District Court of the Virgin Islands. The District Court vacated the Order and Petitioner closed with no lawful order of the PSC prohibiting closing in effect. In essence, Petitioner's action in closing the purchase after the order was vacated had the same effect as if Petitioner had closed in December of 1986. No one would contend that PSC, having been notified in September of 1986, would have a right to rescind the transaction if it closed in December of 1986.

Petitioner fully expects that at some point in the future the issue of the PSC's jurisdiction over Petitioner will become an issue. However, the facts and circumstances of that controversy are not now known. The Third Circuit should not have anticipated a yet unknown case and controversy. *American Book Co. v. Kansas*, 193 U.S. 49, 51-52 (1904); *Alejandrino v. Quezan*, 271 U.S. 528, 535 (1926).

The Third Circuit's decision is in direct and apparent conflict with well established precedent established by the Supreme Court. Also, at the heart of this issue is the effect of Rule 62 of the Federal Rules of Civil Procedure and the legal effect of a "permanent" injunction.[17] In

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[17] Rule 62 provides the procedure to stay a party's actions during an appeal from a judgment granting, dissolving or

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Edgar v. Mite Corp., 457 U.S. 624 (1982), a bare majority of the Supreme Court refused to decide whether a preliminary injunction provided a complete defense to civil or criminal penalties. Justice Stevens acknowledged a preliminary injunction may be obtained upon "a mere probability of success on the merits." In this case, relying on a "permanent" injunction which was unstayed, Petitioner altered its position. Petitioner had no choice but to consummate the transaction since the contract including extensions had expired. ITT would not have waited the ten months necessary to obtain a decision from the Third Circuit. Nearly one hundred million dollars changed hands when this transaction was consummated. Now, the Third Circuit suggests that the transaction can be rescinded, causing losses of millions of dollars. If this is the law, future parties in Petitioner's position face a hobson's choice: (i) rely on a permanent injunction and close knowing a reversal on appeal can cost millions, or (ii) await the outcome of the appeal and lose the transaction because of the delay caused from the appeal.[18] A permanent injunction resulting from success on the merits which is unstayed should provide a complete defense to civil as well as criminal actions taken as a result of reliance on the unstayed judgment. A permanent

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denying an injunction. The Respondent's failure to avail itself of Rule 62 allowed the Petitioner to close the transaction, thus rendering the case moot. Had the Respondent properly followed the procedures set forth in Rule 62 the sale of Vitelco to Petitioner would be stayed and, arguably, a case and controversy would exist. The Respondent should not gain the benefit and protection provided in Rule 62 by failing to properly follow the clear language of that Rule.

[18] In such a case who would pay damages if the lower court judgment and grant of a permanent injunction is sustained but the party loses the transaction because of delays occasioned by the appeal.

injunction should either shift the burden to the enjoined party to obtain an immediate stay or accept the consequences action consistent with the permanent injunction. Clarity of this issue is of national importance.

IV.

APPLICATION OF THE PRE-AMENDMENT STATUTORY SCHEME TO THE OWNER'S SALE OF THE UTILITY'S STOCK IS INVALIDATED BY THE COMMERCE CLAUSE.

In *JDS Realty Corp. v. Government of the Virgin Islands*, 824 F.2d 256, 260 (3rd Cir., 1987), the Third Circuit concluded that the powers granted to Congress by the Commerce Clause of the United States Constitution are implicit in the territorial clause.[19] The Virgin Islands statutes as interpreted by the Third Circuit grant the PSC jurisdiction over the sale of utility's stock by its owner (i) without any standards of review; (ii) without any threshold requirement for jurisdiction; and (iii) without any procedural guarantees (no timetable, no notice requirements, no information requirements). In other words, the Virgin Islands statutes are deemed to give the PSC discretionary jurisdiction over the sale of any utility's stock with no criteria for its review allowing the PSC to make up the rules of the game as it is being played. Petitioner believes that this type of jurisdiction is in conflict with the Commerce Clause of the Constitution as interpreted by the Court in its decision of *Edgar v. Mite*, 457 U.S. 624 (1982).

This case is not one which involves matters of "corporate governance,"[20] therefore, *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970), applies the following tests:

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[19] The judgment was vacated and remanded on other grounds. 108 S.Ct. 687 (1988).

[20] In *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1649-51 (1987), the Court concluded the *Pike* Test does not apply to matters of Corporate Governance. *See also, Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir., 1988).

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to punitive local benefits." *Id.* at 142. *See also, Edgar v. Mite*, 457 U.S. 624, 643-46 (1982).

The sale of Vitelco's stock by ITT, a New York corporation, to Petitioner, clearly involved interstate commerce. The contract was negotiated and executed in New York City and even though closing took place in the Virgin Islands, the funds were transferred by a wire transfer from Hutton's account in New York City to ITT's account in New York City (the funds were never transferred to the Virgin Islands).

The burden imposed by the grant of jurisdiction is clearly excessive in relation to the local interest it purports to further. Vitelco is a privately owned utility. By devoting its property to public use Vitelco does not give up its right to manage its property. This rule has been best articulated by the Court in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276 (1923), where Justice McReynolds declared:

> "It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company*, 291 Ill. 209, 234.
>
> > 'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.' "

Id. at 289.

More recently, a decision based upon the First Amendment, reaffirmed that principle by holding that a commission could not order a utility to use its property,[21] billing envelopes, to promote an opposing viewpoint. *Pacific Gas & Electric v. P.U.C. of California*, 106 S.Ct. 903 (1986). In a footnote in his concurring opinion, Justice Marshall stated:

> "1. The State seizes upon appellant's status as a regulated monopoly in order to argue that the inclusion of postage and other billing costs in the utility's rate base demonstrates that these items 'belong' to the public, which has paid for them. However, a consumer who purchases food in a grocery store is 'paying' for the store's rent, heat, electricity, wages, etc., but no one would seriously argue that the consumer thereby acquires a property interest in the store. That the utility passes on its overhead costs to ratepayers at a rate fixed by law rather than the market cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes, see *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 534, n. 1, 100 S.Ct. 2326, 2331, n. 1, 65 L.Ed.2d 319 (1980). The State could have concluded that the public interest would be best served by state ownership of utilities. Having chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has 'paid' for the property by paying utility bills. . . ."

The Third Circuit extends the concept of regulation to the utility's owner over the most fundamental right of private property; the right to alienate property. All this with no standards or criteria, or with no guarantees as to procedural due process. For instance, the Petitioner was not notified of the first public meeting until some four

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[21] The Court stated that the Commissions "argument misperceives both the relevant property rights and nature of the State's First Amendment violation." *Id.* at 912.

months after the PSC was first notified of the sale and some five months after the Governor of the Virgin Islands was notified of the sale. When this transaction closed, ITT was under no binding obligation to close since the contract and all extensions had expired. Further, Petitioner had to pay over $1,000,000 in interest as a result of extensions it did receive. Public interest is limited to the services provided by the utility, rates charged by the utility for such services and the safe delivery by the utility of such services.

There is ample authority in the statutory scheme to protect the public legitimate interest without extending the PSC's jurisdiction to restrict or condition the sale of Vitelco's stock by ITT. Further, the possible loss of the franchise, a valuable property right, if Vitelco fails to deliver the service required under the franchise agreement, is a non-statutory inducement for Petitioner to insure that Vitelco will continue to provide modern telecommunication services. A statute granting jurisdiction and the freedom for the PSC to make rules as it goes is invalidated by the Commerce Clause under the principles of *Edgar v. Mite*, 457 U.S. 624 (1982).[22]

CONCLUSION

For the above reasons, this Petition for Certiorari should be granted. If the Petitioner is correct in urging that jurisdiction cannot be inferred from the pre-amendment statutory scheme or, if the inference of jurisdiction violates the Commerce Clause of the United States Constitution, then the judgment of the Third Circuit should be vacated and the case should be remanded to the Third Circuit for further proceedings regarding whether Act

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[22] Query, does the FCC approval of ATN's acquisition of the Vitelco stock from ITT raise a supremacy clause argument?

No. 5258 can be constitutionally applied to this case. If the Petitioner is correct in urging that this case was moot, the Court should vacate the Third Circuit's decision and dismiss the case as moot.

Respectfully Submitted,

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands corporation,
Petitioner

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TABLE OF CONTENTS FOR APPENDIX

1. Opinion of the panel of the Court of Appeals for the Third Circuit ..... App. 1

2. Transcript setting forth the opinion of the District Court Judge for the Federal District Court of the United States Virgin Islands ..... App. 11

3. Order of the Federal District Court ..... App. 26

4. Order of the Court of Appeals for the Third Circuit denying the request for rehearing ..... App. 28

5. PSC Order No. 22-1987, conditioning the sale of Vitelco stock from ITT to ATN ..... App. 30

6. Applicable statutes of Virgin Islands Code ..... App. 39

7. Act No. 5258, amending the V.I.C. granting jurisdiction to the PSC, effective May 19, 1987 ..... App. 50

8. Excerpt from the transcript of PSC proceedings on April 21, 1987, dealing with the adoption of PSC Order No. 22-1987 ..... App. 53

9. PSC Order No. 25-1987 moving May 22, 1987 PSC meeting to June 9, 1987 ..... App. 57

10. Swoboda Statement—A comparison of the PSC's Chief Counsel's statements in her brief to the Third Circuit to the actual statement of Swoboda ..... App. 59

11. PSC findings of July 7, 1988, in re docket 316, resulting in a rate decrease to Vitelco ..... App. 71

APPENDIX

Opinion of the Panel of the Court of Appeals for the Third Circuit

ATLANTIC TELE-NETWORK Co.,
a V.I. Corp.

v.

The PUBLIC SERVICES COMMISSION OF the VIRGIN ISLANDS, Patrick M. Rice, Executive Director of the Public Services Commission, Appellants.

No. 87-3485.

United States Court of Appeals,
Third Circuit.

Argued Dec. 9, 1987.

Decided March 10, 1988.

The purchaser of a telephone company's stock filed suit to challenge the imposition of conditions on the sale. The District Court for the District of the Virgin Islands, Almeric L. Christian, Chief Judge, held that the Virgin Islands Public Service Commission did not have the authority to impose conditions. Commission appealed. The Court of Appeals, Stapleton, Circuit Judge, held that the Commission's enabling statutes gave it the authority to regulate the sale of stock of the telephone company to assure the company's continued ability to provide adequate facilities and service of reasonable rates, even though, before the statutes were amended, they did not explicitly give the Commission the power to regulate the sale of a utility's stock.

Reversed and remanded.

Telecommunications

Virgin Islands Public Service Commission had authority to impose conditions on sale of telephone company's stock as means of assuring company's continued ability to provide adequate facilities and services at reasonable rates, even though Commission's enabling statutes, before amendment, did not explicitly give Commission power to regulate sale of stock. 30 V.I.C. §§ 1(a)(3), 2, 4, 39, 41.

Nicholas W. Fels, Paul J. Berman, Alan Tawshunsky, Covington Burling, Washington, D.C., Winston A. Hodge, Albert A. Sheen (argued), Winston A. Hodge, P.C., Christiansted, St. Croix, U.S. Virgin Islands, for appellee.

Maria Tankenson Hodge (argued), Maria Tankenson Hodge, P.C., St. Thomas, V.I., for appellants.

Before GIBBONS, Chief Judge, and STAPLETON and MANSMANN, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Atlantic Tele-Network Company (ATN) here challength the authority of the Public Service Commission of the Virgin Islands (PSC) to regulate the sale of the stock of the Virgin Islands Telephone Corporation (Vitelco) to ATN. The district court held that the PSC did not have authority to impose conditions on the sale under its original enabling statute and that the application to this sale of a statutory amendment explicitly granting such author-

ity would violate the Contract Clause. Because we find that the statute prior to its amendment gave the PSC the authority to impose the disputed conditions, we will reverse.

I.

Vitelco is the sole telephone company in the Virgin Islands. It was created in 1959 as a wholly owned subsidiary of the International Telephone and Telegraph Company (ITT) pursuant to an agreement between the Government of the Virgin Islands and ITT. The 1959 agreement prohibited the transfer of Vitelco's stock for a period of five years,[1] and required Vitelco to sign a franchise agreement that included a prohibition against transfer of the franchise without the consent of the PSC.

On January 9, 1987, ITT entered a Stock Purchase and Sale Agreement in which it agreed to sell all the shares of Vitelco's capital stock to ATN, a corporation that had been formed by a group of investors for the purpose of acquiring and controlling Vitelco.

The PSC of this agreement and attempted to exercise its regulatory authority over Vitelco by imposing conditions on the terms of the stock sale. The PSC held several hearings beginning in January, 1987, and entered sev-

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1. The provision stated:

> That, for a period of at least five (5) years from the date of such assignment, [ITT] will not relinquish majority stock control of [Vitelco], and [Vitelco], by its acceptance of the assignment of this agreement warrants that it will not, within the said five year period, sell its capital stock in such manner as to transfer stock control to any party other than [ITT].

App. at A-311 ¶ 1(d).

eral orders setting forth its conditions for approving the sale. ATN decided to participate voluntarily in all of the PSC proceedings and attempted to accommodate the PSC's concerns by modifying the agreement. ATN maintained throughout, however, that the PSC had no power to disapprove the sale or impose conditions.

On April 23, 1987, following the fourth hearing on the matter, the PSC issued the order contested in this case, No. 22-1987. In this order, the PSC concluded that certain terms of the sale relating to financing threatened the economic viability of Vitelco, and directed that the sale not be consummated unless certain conditions were satisfied. The primary difficulty identified by the PSC was that of a purchase price of approximately $98 million, ATN was to put up only $15.5 million in equity and borrow the remaining $82.5 million from its principal stockholder using the assets of Vitelco as collateral.

In order to insure that ATN would be able to pay its indebtedness to its principal stockholder, the agreement of sale called for the imposition of several restrictions on Vitelco. First, there was to be a "negative pledge of assets," under which Vitelco, for the duration of ATN's loan, would be foreclosed from pledging any of its assets to obtain additional capital, with the sole exception that Vitelco could execute purchase money mortgages in connection with purchases of new equipment. Second, for the duration of the loan, Vitelco was to take no action that would restrict Vitelco's ability to pay dividends to ATN. These restrictions led the PSC to conclude that

> inasmuch as Vitelco will be ATN's sole source of repayment of its $80 million debt, as well as its manda-

> tory 12% annual dividend to preferred shareholders, there will be an unavoidable financial harm to Vitelco, including an immediate negative effect on retained earnings, and a negative cash flow by 1994, with a consequent upsurge in pressure to sacrifice reasonable capital investment requirements and prudent maintenance and operation expense obligations. Further, since the Vitelco stock is pledged as security for the debt, default would result in a chaotic situation for the utility.

App. at A-100. The PSC ordered that the sale not take place unless the negative pledge of assets and the restrictions on dividends were removed. The PSC also required that ATN's principal stockholder provide Vitelco with a $15 million irrevocable letter of credit, and stated several other conditions of its approval.

On May 18, 1987 the Virgin Islands legislature enacted Act No. 5258, which was signed into law the next day. This statute provides:

> No person or corporation, whether or not organized under the laws of the Territory, shall sell, acquire or transfer control, either directly, or indirectly of any public utility organized and doing business in this territory, without first securing authorization from the commission. Any such acquisition or control without prior authorization shall be void and of no effect.

Act No. 5258, § 1(a) (May 18, 1987) (to be codified at 30 V.I.C. § 43a), *reprinted in* App. at A-130.

Five days later, ATN filed a petition for reconsideration of the PSC's April 23rd order under 30 V.I.C. § 33 (1976). The PSC scheduled a hearing on this petition, but before the hearing could be held, ATN filed this suit in the District Court of the Virgin Islands on June 2, 1987. ATN

sought declaratory and injunctive relief against interference by the PSC with ATN's purchase of Vitelco's stock. The district court granted ATN's summary judgment motion. This appeal followed.

We have jurisdiction under 28 U.S.C. § 1291 (1982). Our review of the district court's determination regarding the PSC's authority to regulate the sale of Vitelco's stock is plenary.[2]

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2. After the district court's decision, the purchase of Vitelco's stock by ATN was consummated. ATN then moved to dismiss on the ground that the case is now moot. The relevant question in mootness analysis is whether in light of changed circumstances the court can afford meaningful relief. *See Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1108 (3d Cir.1985), *cert. denied*, 475 U.S. 1013, 106 S.Ct. 1190, 89 L.Ed.2d 305 (1986); *Natural Resources Defense Council, Inc. v. United States EPA*, 683 F.2d 752, 759 (3d Cir.1982) (relevant mootness analysis is whether the "court could order relief in this case which would cure an injury which would otherwise continue to exist").

In this case, the court can afford meaningful relief by reversing because the PSC would then have the authority to impose fines for a violation of its order and perhaps to seek rescission of the contract. *See* 30 V.I.C. § 39 (1976). Although the PSC could choose not to seek these remedies, its right to consider them in subsequent proceedings makes this controversy a live one.

This case is controlled by this court's decision in *Jersey Central Power & Light*. In that case, a utility company brought suit to declare unconstitutional a town's ordinance prohibiting the importation of nuclear waste into the town for the purpose of storage there. The district court declared the ordinance unconstitutional and enjoined its enforcement, and the town appealed. While the appeal was pending, the utility company placed nuclear waste in a storage facility in the town. The court of appeals held that the case was not moot on two separate grounds. First, the court noted that the district court's injunction allowed storage as well as im-

(Continued on following page)

II.

Vitelco is a public utility. 30 V.I.C. § 1(a)(3)(1976). As a public utility, Vitelco "is required [by the Public Utilities Act] to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable." 30 V.I.C. § 2 (1976).

Under the Act, the PSC has broad authority to regulate public utilities. In particular, the PSC has

> the power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of this chapter, and with all other laws of the Virgin Islands applicable, and any ordinance or regulation relating to said public utility, and to conform to the duties upon it thereby imposed or by the provisions of its own charter, if any charter has or shall be granted it.

30 V.I.C. § 4 (1976). In addition to granting the PSC these explicit powers, the statute also states:

> The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Commission by the provisions of this chapter the enumeration thereof shall not be held to exclude or impair any power or authority otherwise

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(Continued from previous page)

portation. The court then reasoned that, because the storage continued, if the court reversed the town could get an injunction requiring the removal of the nuclear waste. Second, the court noted that the town could impose fines on the utility company under the ordinance if the court reversed. *Jersey Central Power & Light* supports the PSC's position since, like the town in that case, the PSC could seek to impose fines or to rescind the sale if the judgment of the district court is reversed.

> in this chapter conferred on said Commission. *The Commission hereby created shall have, in addition to the powers in this chapter specified, mentioned, and indicated all additional, implied, and incidental power which may be proper and necessary to effect and carry out, perform and execute all the said powers herein specified, mentioned, and indicated.*

30 V.I.C. § 41 (1976) (emphasis added).

Although no statutory provision enacted before the May, 1987 amendment explicitly gives the PSC the power to regulate the sale of a utility's stock, this power must be inferred from the pre-amendment statutory scheme. The PSC is charged with the responsibility of seeing that a utility meets its statutory obligation to provide adequate facilities and service at reasonable rates. In order to fulfill this responsibility, the PSC must have the authority to require a utility to maintain the kind of financial stability that will enable it to continue providing adequate facilities and service at reasonable rates in the future. In particular, if a sale of a utility's stock is proposed on terms that the PSC concludes will deprive the utility of such financial stability, it must be able to act effectively or its statutory mandate will go unfulfilled.

In Vitelco's case, the PSC in its April 23rd Order found that under the terms of the sale of Vitelco's stock to ATN, Vitelco is required to engage in conduct that will jeopardize its ability to provide adequate facilities and service at reasonable rates in the future. Once the PSC made such a finding, it had broad remedial powers to compel Vitelco to conform to its statutory duty. Although the district court held that the sale of Vitelco's stock on the proposed terms would not directly and immediately affect

rates and services, we do not believe the Virgin Islands legislature intended that the PSC would have to wait until disaster struck before taking remedial action.

ATN argues that the PSC's order attempts to regulate not Vitelco, but ATN and ITT, which are not public utilities. Although we agree that the PSC has no authority to regulate the conduct of ATN or ITT *per se,* we conclude that it clearly has the authority to regulate what they can extract from or impose upon Vitelco. If we were to accept ATN's position that the PSC has no authority with respect to the sale of Vitelco's stock, it would necessarily follow that the PSC is powerless to stop ATN from causing Vitelco to place securities in the market containing covenants with unreasonable restrictions on Vitelco's use of its assets. We conclude that the PSC's powers are not so constrained.

In addition, ATN contends that the five year prohibition on the transfer of control of Vitelco's stock contained in the 1959 agreement evidences the legislature's intent not to allow the PSC to interfere with any stock transfers after that time. Suffice it to say that we do not read that agreement as conferring upon ITT and unfettered right to sell Vitelco at the end of the five year period without regard to the effect of the transfer on Vitelco's ability to offer adequate telephone facilities and service at reasonable rates.

III.

We hold that the PSC had authority under the pre-amendment statute to impose conditions on the sale of Vitelco's stock as a means of assuring Vitelco's continuing

ability to provide adequate facilities and service at reasonable rates. In light of this holding, we need not decide whether the application of the statutory amendment to this sale would violate the Contract Clause.[3] We will reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

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3. In addition, given the fact that the PSC has not had an opportunity to take a position on the form its final order will take, we need not decide whether all aspects of the April 23 order fall within the authority of the PSC.

Transcript setting forth the opinion of the District Court Judge for the Federal District Court of the United States Virgin Islands

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST THOMAS & ST. JOHN

- o -

ATLANTIC TELE NETWORK COMPANY	)	
vs.	)	CASE NO. 87
VIRGIN ISLAND PUBLIC SERVICE COMMISSION	)	

REPORTER'S TRANSCRIPT
COURT'S OPINION

BEFORE: HONORABLE ALMERIC L. CHRISTIAN, Chief Judge

APPEARANCES: WINSTON HODGE, Esq.
MARIA T. HODGE, Esq.
DENISE FRANCOIS, Esq.

MICHAEL A. RODRIQUEZ,
Official Court Reporter
District Court
St. Thomas, Virgin Islands

(p. 2) (Thereupon, court was called to order at 11:02 a.m.)

The Court: Good morning.

Attorney Winston Hodge: Good morning.

Attorney Maria Hodge: Good morning.

The Court: The Court is ready to render its decision in the matter, which it took under advisement.

In the course of what I have to say, whenever I refer to the plaintiff, I mean Atlantic Tele-Network Company, I am referring to it simply as Atlantic. I will usually refer to the Public Services Commission as the PSC, the Virgin Islands Telephone Corporation, as Vitelco, and its parent corporation in which name—full name I do not know, I will refer to it as ITT.

When we first met to hear argument on this matter, I said at the outset that the question of exhaustion of remedies had been raised and had resolved that in favor of the plaintiff.

(p. 3) I am now saying, to state the reasons which prompted me in that direction, it was my conclusion then, and it is now, that the Court has jurisdiction to consider the legal issues presented in this matter and to do so without requiring that the plaintiff exhaust administrative remedies.

As we know the doctrine of exhaustion of remedies, it's a judge-made rule, and it does not bare upon subject matter jurisdiction. Susquehanna Valley Alliance v. Three Mile Island, 619 F. 2d 231, 245 (3d Cir. 1980) cert denied, 449 U.S. 1096 (1981).

In dictating this opinion from the bench, hereafter, I might omit the citation, and I will give it to the reporter, and he may put them in the record later. Some of the times I will mention the citations.

To go on then, moreover, as the Supreme Court noted in McKart versus United States, 395 U.S. 185 (1969), the exhaustion doctrine "is, like most judicial (p. 4) doctrines subject to numerous judicial exceptions." Id at 193.

Exhaustion of administrative remedies is unnecessary when there is no need for development of a factual record and the challenge raises the question of the constitutionality of the agencies enabling statute. And there are several citations in support of this: Susquehanna Valley Alliance, 169 F.2d at 244-44; see also Moore v. City of East Cleveland, 431 U.S. 494 (1977); Weinberger v. Safi, 422 U.S. 749 (1975).

In addition, judicial intervention prior to the final decision from an agency is permissible when the question is whether the agency acted in excess of its statutory authority. Leedom v. Kyne, 358 U.S. 184, 190-91 (1958).

Admittedly, judicial intervention is not warranted in every case in which an agency's jurisdiction is challenged.

Exhaustion is not required, however, where: (1), pursuit of the agency remedy will cause irreparable injury; and (p. 5) (2), when it seems clear that the agency lacks jurisdiction; and (3) where the agency's special expertise will be of no help on the question of its jurisdiction. Marshal v. Burlington Northern, Inc., 595 F.2d 513 (9th Cir. 1979); Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir. 1981); see al: 4 K. Davis, Administrative Law Treaties, section 26:5 (2d Ed. 1983).

It appears to this Court that all three of these factors have been satisfied for, in the first place, Atlantic is subject to high interest rates—high interest charges and

these continue to accrue and accumulate and will do so until this sale has been finalized.

Secondly, at this stage of these proceedings, it appears that the PSC pre-amended enabling statutes, 30 V.I.C. Section 1 et. seq., do not allow the commission to act beyond the regulation of rates charged and the regulation of services performed by public utilities. And (3), we do not consider the agency's expertise, on the parameters of its jurisdiction to be of (p. 6) much help in deciding this matter.

Thus, this court concludes that Atlantic need not have exhausted administrative remedies before the PSC and that this Court has jurisdiction to hear and determine the matter on the two issues presented [by counsel for Atlantic], and they are whether the PSC did, indeed, have jurisdiction to impose conditions on the sale of Vitelco prior to the May 19, 1987 amendment, Section 43(a) to the PSC's enabling statutes; and secondly, whether the amendment, which has taken form of Section 43, permits the PSC to impose such conditions.

I am going to focus next on the claim of impairment of contract.

Atlantic maintains that any application of Act No. 5258, the amendment in question, to the transaction between it and ITT violates the contract clause of the United States Constitution, Article I Section 10, clause one, as extended to this territory by the Bill of Rights by the Revised Organic Act of the Virgin Islands (p. 7) 48 U.S.C. Section 1561.

In response, the PSC contends that enactment of the statute was a valid exercise of this territory's police pow-

ers and may be properly applied to the sale of Vitelco stock.

At the outset, we note that for purpose of Contract Clause analysis, distinctions between contracts, which have been executed and those which remain executory are immaterial. Home Building and Loan Assocation v. Blaisdell, 290 U.S. 398, 429 n.8 (1934). Therefore, our discussion on this matter is unaffected by the fact that the sale of Vitelco stock has yet to be consummated.

Now, it is well settled that despite the absolute language of the Contract Clause, the prohibition against impairing the obligation of contracts is not to be read literally. Keystone Bituminous Coal Association v. De Benedicts, 107 S.Ct. 1232, 1251 (1987), citing W.B. Worthen Co. v. Thomas, 292 V.S. 426, 433 (1934).

Moreover, operation of (p. 8) the Contract Clause does not obliterate the inherent police power of the state. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1, 2 (1977). And in this case, whenever I use "state" we are using it with the understanding that this territory stands in the sted of the state.

Yet, the sovereign right of government to pass statutes for the promotion of the good of the public despite the impairment of an existing contractual relationship is not without limitation imposed by the Contract Clause. Allied Structural Steel Co., 438 U.S. at 242.

The Supreme Court has fashioned the following tests to aid in the determination of whether a challenged statute makes a rational accommodation between the state's police power and the Contract Clause.

Firstly, one must consider whether the newly enacted statute has substantially impaired a contractual relationship. See, e.g., Keystone Bituminous Coal, 107 S.Ct. at 1252; Energy Reserves Group, (p. 9) Inc. v. Kansas Power & Light, 459 U.S. 400, 411 (1983); Nieves v. Hess Oil Virgin Islands Corporation, Civ. No. 86-3049, slip op at 13 (3d Cir. May 22, 1987).

Secondly, if the law is found to constitute a substantial impairment, it must next be determined whether there is a "significant and legitimate public purpose behind the regulation . . ." See, e.g., Energy Reserves, 459 U.S. at 411-12, Nieves, slip op at 14; Troy, Ltd. v. Renna, 727 F.2d 287, 297 (3d Cir. 1984).

And thirdly, if the second inquiry is answered in the affirmative then, one must determine "whether the adjustment of the rights and responsibilities of the contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Nieves, slip op at 14. Citing Energy Reserves, 459 U.S. at 412.

If the state is not a party (or territory) is not a party to the contract, deference to legislative judgment (p. 10) regarding the "necessity and reasonableness of a particular measure" is warranted. Energy Reserves, 459 U.S. at 412-13. Deference, however, does not mean total acceptance of the judgment of the legislature without judicial scrutiny. Allied Structural Steel, 438 U.S. at 247.

With the foregoing precepts in mind then, let us examine the instant situation. Atlantic and ITT entered

into a purchase and sale agreement in January of the current year.

Although it is fair to say that the parties anticipated that the PSC might albeit unjustifiably interfere with the terms of the sale, it is clear from the record of the administrative proceedings that Atlantic intended to contest on appeal any order entered by the PSC which imposed conditions on the sale.

It is, therefore, clear that Atlantic, when contracting, did not expect imposition of the onerous conditions which the PSC has eventually laid down.

Consequently, we must (p. 11) conclude, and we do conclude that Act No. 5258 substantially impaired Atlantic's reasonable expectation to consummate this sale without undue interference from the PSC.

Moreover, as we view all the circumstances disclosed in the records, we discern no valid public purpose to the amendment, as Nieves tells us, "legislation aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to the charge that it is not reasonably related to the assorted public purposes." Nieves, slip op at 28. Passage of 43(a) was specifically aimed at obstructing the private contract between Atlantic and ITT. This enactment, therefore, can hardly be viewed as general legislation for the public welfare. Id. at 29-30.

For the foregoing reason, we conclude that the amendment to the enabling provisions of the PSC, as applied to the transaction before us, indeed, constitutes an unjustified impairment of Atlantic's legitimate rights and expectations.

(p. 12) In so saying then, it follows that if the conditions imposed by the PSC are to be upheld, it must be then on the basis of the law as it existed prior to the passage of Act No. 5258.

Now, it is axiomatic that absent legislative authority, an administrative agency is powerless to act. Louisiana Public Service Commission v. F.C.C., 105 S.Ct. 1890, 1901 (1986).

Hence, the PSC may not condition the sale of Vitelco stocks unless it has been granted the direct authority to do so. We cite here Pennsylvania Public Utilities Commission versus Philadelphia Electric Company, 460 A.2d 734 (Pa. 1983).

Title 30 of the Virgin Islands Code, Section 1 et seq., and the following sections impowered the PSC to regulate the rates charged and services provided by public utilities.

No where in these enabling provisions was the PSC authorized to approve or disapprove the sale of utility's stock by imposing conditions upon which a (p. 13) sale such as this may be consummated. This situation before us—excuse me, this situation is very much unlike that of the Pennsylvania's Public Utility Commission, which has been found to have had direct authorization under its enabling statute to disapprove, based on the electric company's "credit and prospects", a proposed issuance of securities to finance the completion of a nuclear power plant. Pennsylvania Public Utility Commission, 460 A.2d at 737-38. The relevant statute empowering that commission to register or reject securities, certificates, provided

specifically that in its determination in whether to register or reject the securities, the commission could "consider . . . [the utility's] credit and prospects, and other relevant matters." And to consider the utility credit and prospects and other relevant matters is a direct quote from the case. And the Court in that case quoted directly from Section 1903(a) of the Pennsylvania Public Utility's Codes.

In contrast to the Pennsylvania situation, the Virgin Islands (p. 14) Code did not authorize the PSC to approve their sale of a public utility far less allow it to consider the utility's future financial viability prior to such determination.

Moreover, Section 30 of the Virgin Islands Codes at Section 41 did not impower the PSC to regulate the sale.

Admittedly, Section 41 grants the PSC the authority to do all which is "necessary and proper" to carry out the powers enumerated in Title 30. But such "necessary and proper" clauses, simply augment existing powers; they do not confer independent authority to act.

Thus, Section 41 confers authority to do only what is necessary and proper to regulate rates and services. It does not extend or by implication allow or grant such powers to the PSC. The mere sale of Vitelco stock will not directly and immediately affect rates and services. The contract at issue contemplates no such change; if it had, the PSC might conceivably have authority to act but that is not the situation before us. See Preston County (p. 15) Light and Power Co. v. Renick, 113 S.E.2d 380, 389 (WVA 1960).

We, therefore, conclude that the PSC had no authority prior to the enactment of Act 5258 to impose condi-

tions upon the sale of VITELCO stock. The authority to impose pre-conditions flows from the power to deny altogether. Lacking the latter, the PSC was without jurisdiction to exercise the former I feel moved to make some further comments on the two issues raised and these comments are made in support of the conclusions finally reached.

Counsel for Atlantic argues that the Government of the Virgin Islands was a party to this contract. We do not agree with that. We do say, however, that the 1959 doings have a direct bearing. In 1959 a franchise agreement was executed. On the same day a purchase and sale agreement was executed; both as I have said on the same date, that date being October 30, 1959. Obviously, there must have been negotiations between the parties, ITT and the Government of the Virgin Islands. And we have the final (p. 16) outcome of such negotiations. The final outcome was that as to the franchise agreement there could be no transfer of the franchise. But, as to the purchase and sale agreements, the prohibition against transfer was limited to the five years next ensuing.

The reasonable inference to be drawn from this is not only that the PSC lacked the power prior to their May, 1987 amendments, but that its lack of power was specifically bargained for and intended. The five-year period, having expired, long expired by 1987, we are of the opinion that ITT had full right to sell to Atlantic as it so chose and that Atlantic bought what it bargained for. And, what it bought by that contract and is supposed to receive is whatever ITT had and one of the things that ITT had was the unfettered right to convey after five years.

And to do so without interference from the PSC and for that matter from anyone else.

Here let me digress to mention something. At the second hearing (p. 17) counsel for PSC presented to the Court as an exhibit or an attachment to their papers an opinion from the Attorney General from the Virgin Islands.

Subsequently, it is my understanding that a page eight was delivered, either to the clerk's office or to my law clerk's office, either the other or both, saying that page eight as submitted was not the correct page.

I have read the opinion of the Attorney General, but I have read it with the page eight originally submitted. I do not accept amendments to documents submitted to the Court once accepted by the Court by anyone handing a copy of a claimed corrected copy to anyone without the Court's permission. This requires a motion and an order. Since none was asked and none given, I have not read this second or this supposedly corrected page eight.

Anything I have said or anything I do say is based on the exhibit as submitted in court. I would like to make a few more comments on the matter of impairment (p. 18) of contract. The legislative record is replete with statements which reveal quite clearly what was the purpose of the proponent of this legislature and ultimately of the legislature in adopting it, and we find that purpose was to hinder, obstruct, delay, and, perhaps, even bar altogether.

We first look at the intricate legislative maneuvering with objections from senators. Incidentally, that was necessary to bring the bill on the floor. If you look at the

statements in the records of the proponent of the bill and the other senator who spoke in favor of the bill, the purpose becomes quite clear, and while I applaud the proponent for close working with the executive, the alacrity that the bill was approved—passed on the 18th, approved on the 19th, tends to say something to this Court.

One senator who incidentally voted against the amendment decried what he described as the "rushed to judgement" and that same senator, sensing what he deemed to be improper purpose and (p. 19) action, described the amendment as changing the rules in the ninth inning of the ball game. The other senator who spoke against the bill came closer in legal parlance and though, fearing constitutional impermissibility and he went on to describe the amendments as Ex Post Facto. He understood what was going on, even if he relied on the wrong constitutional prohibition. It is fair to say that the senators knew what they were about. Their own legislative counsel had advised them of the correctness of Atlantic's position in the matter, that the power sought to be exercised by the PSC was not there. Thus the senators felt they had to act and to act quickly before the matter reached "a judge" as the proponent more than once stated. I suppose the unspoken descriptive word of "a judge" or either "a meddling" judge or perhaps a "dumb judge". From the beginning, motive and purpose are made clear from the record. The first amendment proposed would have required not only the prior authorization of the PSC but, in addition, there to legislative (p. 20) ratification.

It seems, however, that wiser heads prevailed. And the legislative ratification was dropped. Moving the same senator who had spoken of Ex Post Facto to remark that

the earlier amendment was reinvesting authority back into the legislature and that so doing "would have meant sure trouble", this Act No. 5258 did more in my judgment than impair. Section 43(a) proclaimed the validly existing contract between the contracting party void and of no affect, not worth the paper on which it was written. The attempt to now hold such action in the peril of the nicety of Contract Clause analysis and to cover it with the cloak of police power of the Government in my view must necessarily fail.

In closing, I would make clear what has been today decided. Nothing here said speaks to the powers of the PSC to regulate once the same has been consummated, if it is consummated and whatever be the basis of such consummation. Nor is the amendment declared invalid. This court (p. 21) holds no more than that under existing law, as is obtained prior to the May 1987 amendment the PSC was not empowered to grant or withhold its approval to a sale of a public utility. Therefore, it could not lawfully impose conditions on such a sale. We hold also that act No. 5258 may not be applied to the contract with which we are concerned in this instant matter, for to do so, would be to run afoul of the Contract Clause of the Constitution of the United States, extended to this territory by the Revised Organic Act of the Virgin Islands.

That is the Court's opinion and decision. If the plaintiff will submit an appropriate form of judgment, the Court will review it and if it is in order sign it. Because the PSC is required to be vigilant and because it is better that they be overzealous than not so, the Court will not favorably entertain application for allowance of cost

or attorneys fees. Each side must bare their respective costs, including attorneys fees.

The Court: Very well.

(p. 22) Attorney Winston Hodge: If Your Honor, please.

The Court: Beg pardon?

Attorney Winston Hodge: With the Court's permission, the order can be submitted to counsel for PSC for review first?

The Court: Well, isn't that the customary practice?

Attorney Winston Hodge: Yes.

The Court: Yes, always follow the customary practice. Yes, because if the draft you prepare is not acceptable, then they will so state and then I will have both views.

Attorney Winston Hodge: Very well, sir.

The Court: Very well. Thank you.

(Thereupon, court adjourned at 11:45 a.m.).

(p. 23) CERTIFICATE OF REPORTER

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the District Court of the Virgin Islands, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the trial in the case of ATLANTIC TELE NETWORK COMPANY VS. VIRGIN ISLAND PUBLIC SERVICE COMMISSIONER.

I further certify that I was authorized and did report by stenotype the proceedings and evidenced in said trial,

and that the foregoing pages numbered 1 to 23 inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF I have hereto subscribed my name this 24th day of June, 1987.

/s/ Michael A. Rodriquez
MICHAEL A. RODRIQUEZ
Official Court Reporter

Order of the Federal District Court

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ATLANTIC TELE-NETWORK CO., a Virgin Islands Corporation, Plaintiff, vs. THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS and PATRICK M. RICE, Executive Director of the Public Services Commission, Defendants.	CIVIL NO. 1987-257 ACTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

JUDGMENT OF THE COURT

This matter came on for hearing on the Plaintiff's motion for summary judgment on its complaint for declaratory relief. The Court considered the evidence and memoranda of law submitted by the parties, and having given due consideration to the oral arguments of counsels of the respective parties, and the Court having rendered its oral opinion,

IT IS HEREBY ADJUDGED, DECREED and DECLARED that:

1. The Defendant Virgin Islands Public Services Commission, prior to May 19, 1987, was not empowered to grant

or withhold approval of the sale of the stock of the Virgin Islands Telephone Corporation to Plaintiff Atlantic Tele-Network Co., nor could it impose any conditions on such a sale;

2. Act No. 5258 of the Legislature of the Virgin Islands constitutes a substantial and unjustified impairment of Plaintiff Atlantic Tele-Network Co.'s legitimate rights and expectations and may not be constitutionally applied to the Plaintiff's contract to purchase the stock of the Virgin Islands Telephone Corporation;

3. Therefore, the Virgin Islands Public Services Commission is permanently enjoined from granting or withholding its approval of the sale of the stock of the Virgin Islands Telephone Corporation to Plaintiff, and from imposing any conditions on such sale.

DONE THIS 7th DAY OF JULY, 1987.

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
CHIEF JUDGE

ATTEST:

ORINN ARNOLD
CLERK OF THE COURT

By: /s/ Frank Blackman
Deputy Clerk

Order of the Court of Appeals for the Third Circuit Denying the Request for Rehearing

SALLY MRVOS
Clerk

Telephone
xxxxx

Office of the Clerk

UNITED STATES COURT OF APPEALS
For the Third Circuit
21400 United States Courthouse
INDEPENDENCE MALL WEST
601 Market Street
PHILADELPHIA 19106 - 1790

July 18, 1988

Re: Atlantic Tele-Network Co., etc. v. The Public Services Commission, etc. Appellants

No. 87-3485

Dear Counsel:

Enclosed herewith is conformed copy of order filed by the Court today in the above-entitled case.

Very truly yours,
Sally Mrvos, Clerk

/s/ By: Betty J. Robinson
Betty J. Robinson
Deputy Clerk

sma
Enc.
Copies to All Parties

DIRECT DIAL
597-3155

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3485

ATLANTIC TELE-NETWORK CO.,
a V.I. Corp.

vs.

THE PUBLIC SERVICES COMMISSION
OF THE VIRGIN ISLANDS,
PATRICIA M. RICE, Executive Director
of the Public Services Commission,

Appellants

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Walter Stapleton
Circuit Judge

Dated: July 18, 1988

PSC Order No. 22—1987, Conditioning the Sale of Vitelco Stock from ITT to ATN

PUBLIC SERVICES COMMISSION
P.O. Box 40
Charlotte Amalie, St. Thomas, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE	)	PSC DOCKET
SALE OF STOCK OF THE	)	NO. 301
VIRGIN ISLANDS	)	
TELEPHONE CORPORATION	)	ORDER
	)	NO. 22-1987

The above captioned matter came on for hearing before the Virgin Islands Public Services Commission (hereinafter "Commission") on April 21, 1987, Atlantic Tele Network Company (hereinafter "ATN") being present and represented by its counsel, Winston A. Hodge, Esq., and its principals who are now identified to be Jeffrey Prosser, Cornelius Prior, and E. F. Hutton & Co., Inc., the latter represented by Warren Idsal and Gerald Gminski; also present was the former principal Edward Blankenau, as well as ITT, represented by its counsel, Derrick W. Samuelson, and the Virgin Islands Telephone Corporation (hereinafter "Vitelco") represented by its president, Jack Basford, and its counsel, Samuel Sugden; and the Commission having heard the recommendations and testimony of its staff, and having heard the testimony and argument of ATN and being otherwise duly satisfied in the premises, hereby makes the following findings and conclusions:

1. Following submission to the Commission of the proposed terms of acquisition of all of the stock of Vitelco

by ATN from ITT, certain changes in the ownership of ATN were negotiated and consummated, as a result of which Edmund Blankenau, Craig Swoboda and Mid American Communications Corporation will no longer be shareholders in ATN and will be replaced by Cornelius Prior and E. F. Hutton. The new ownership of ATN will be distributed 27.5% to Jeffrey Prosser, 27.5% to Cornelius Prior, and 45% to E. F. Hutton.

2. In addition to the change in ownership in ATN, the financial terms of the acquisition have been substantially revised. The total cost of the acquisition, which was to be approximately $89 million under the original ATN proposal, will be approximately $98 million under the new proposal. The original proposal involved an equity investment of approximately $14 million, and $75 million in debt to be obtained from First Chicago, with a repayment term of approximately eight (8) years, principal payments to begin in approximately four and one-half (4½) years, all of the foregoing to bear interest at approximately nine (9) percent. It was also agreed on the part of ATN, and stipulated before this Commission on February 21, 1987, that ATN would obtain a letter of credit in the amount of $15 million which was to be irrevocable and which was to serve as a source of additional equity, if needed, in order to cure any default in its loan agreement or in order to supply capital to comply with any lawful order of the Commission. Funds drawn on the letter of credit by ATN would be contributed to Vitelco as additional equity. At the time of the same meeting at which the commitment to secure a letter of credit was made, ATN also agreed to negotiate changes in the terms

of their loan agreements with First Chicago to delete unacceptable covenants which would have had a direct negative impact on Vitelco, either as to its ability to borrow or to make capital investments. All of those objections are more fully stated in the report of the Staff submitted in connection with the transaction as then proposed, and which the Commission, at the time of its order of February 5, 1987, adopted and found persuasive.

3. Under the new transaction, the loan from First Chicago Bank is no longer required. Instead, ATN would secure a "bridge loan" from E. F. Hutton in the amount of $82.5 million, and Hutton would purchase preferred stock from ATN in the amount of $12.5 million. Hutton is to contribute $2 million in common equity, and the other shareholders of ATN a total of $1 million. It is also contemplated that the bridge loan would be converted to a longterm permanent loan in the form of debentures having fifteen (15) year maturities, with repayment of the principal to begin in the eighth year and to be outstanding for approximately eleven and one-half (11½) years, on average, and to bear interest at the rate of eleven (11) percent per annum.

4. While the negative covenants of the First Chicago loan, applicable to or directly affecting Vitelco, have been removed from this proposed method of financing, certain substantial encumbrances upon Vitelco remain. These include what is described by the witnesses as a negative pledge of Vitelco assets to be imposed by ATN, as the stockholder of Vitelco, upon the utility for the duration of the senior debentures. As described by the witnesses, this negative pledge would mean that none of Vitelco's exist-

ing assets could be used as collateral for any loan taken by Vitelco itself. Only new purchases of equipment, which might be accomplished by a purchase money mortgage not to exceed 75% of the total purchase price of the equipment, would be allowed.[1] The Commission doubts that there are many lenders in the Virgin Islands who would be prepared to finance telephone equipment under such an arrangement, given that foreclosure upon, for example, used telephone wire, would not appeal to a lender. We adopt the summary and testimony of Mr. Madan in respect to the negative pledge and conclude that it represents a severe and direct limitation on Vitelco's ability to secure debt in the future which cannot be accepted.

5. In addition, the new financing would impose, for the duration of the senior debentures, an obligation directly on Vitelco to "take no action which would restrict its ability to pay dividends" to ATN. This unusual restriction, more fully described in the testimony of our consultant, Mr. Madan, in the Commission's view, represents an unwarranted reduction in the financial flexibility and discretion of Vitelco, solely for the benefit of the stock purchasers and to insure that they will draw sufficient earnings from Vitelco to pay the massive debt being undertaken to acquire the stock. We conclude that this represents a detriment to Vitelco and its rate payers, with no corresponding benefit to them, and cannot be justified.

6. We are also concerned that the proposal involves the use of a holding company, but that the stockholders re-

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[1]An existing line of credit Vitelco presently holds to a maximum of $5 million would be unaffected.

fuse to give assurances that the holding company will not involve itself in unrelated ventures, relying upon Vitelco's credit worthiness or its operations or officers for the benefit of an unrelated venture. We conclude that such a risk is substantial and that it poses a distinct danger to Vitelco and its rate payers of misuse of their assets or the value thereof.

7. We are also concerned that the newly revised transaction involves massive fees to be paid, not only to the withdrawing shareholders, but to the lenders who will also be owners, which we cannot find justified, particularly when the method to pay these fees appears to be to add their amount to the debt which is to be satisfied by ATN through its only source of income, namely withdrawal of profits from Vitelco. We conclude that Vitelco should not be obligated through any disbursement of profits, dividends, or otherwise, to pay the costs of these fees to affiliates and interested parties, more fully described in the testimony of our consultant, Mr. Madan, beginning at page 19 of his testimony and reflected further in his schedules. We conclude that if such fees are to be paid, they should be the obligation solely of the shareholders of ATN, and not a part of the debt to be financed through withdrawals from Vitelco.

8. We are also disturbed that officers and attorneys representing themselves to be appropriate officials of ATN made commitments to this Commission, more fully set forth in the transcript of the hearing of February 21 and the order of February 25, which the present stockholders choose, in some respects, to disregard. Particularly noticeable is their unwillingness to adhere to the

commitment made directly to this Commission by Mr. Swoboda, identifying himself as a shareholder and attorney for ATN, to secure a letter of credit in the form previously described. It is the position of the Commission that representations of this sort, made by an official of a firm appearing before the Commission, are binding and must be performed.

9. We note also the continued reflection in some documents submitted to the Commission's staff of indications that on-going advisory fees, previously paid to ITT and even then subject to Commission concern, may be intended for payment either to E. F. Hutton or to other principals. Similarly, employment contracts for the principals have been mentioned. The Commission wishes to make clear that any such fees or employment contracts with interested parties or affiliates of Vitelco *will be subject to careful scrutiny to insure that they are arms length and given only for full and reasonable value.*

10. Finally, and of great importance, we credit the careful financial analysis of our staff consultant, Mr. Madan, which is set forth in the schedules to his testimony and strongly indicates an untenable financing burden on Vitelco. His analysis clearly shows that inasmuch as Vitelco will be ATN's sole source of repayment of its $80 million debt, as well as its mandatory 12% annual dividend to preferred shareholders, there will be an unavoidable financial harm to Vitelco, including an immediate negative effect on retained earnings, and a negative cash flow by 1994, with a consequent upsurge in pressure to sacrifice reasonable capital investment requirements and prudent maintenance and operation expense obligations. Further,

since the Vitelco stock is pledged is pledged as security for the debt, default would result in a chaotic situation for the utility.

Only a letter of credit of the type ATN had previously agreed to supply could reasonably protect Vitelco and its rate payers from unreasonable harm and detriment, both to rates and to services.

On the basis of the foregoing findings and conclusions, it is hereby

ORDERED effective forthwith that Vitelco shall not suffer or permit any officer, official, agent or shareholder of Vitelco to impose upon its assets any pledge or negative pledge for any purpose not directly related to the normal borrowing of Vitelco itself for normal and bona fide utility purposes, without the prior consent of this Commission; and it is further

ORDERED that Vitelco, shall not suffer or permit anyone, including without limitation, any of its officers, agents, principals or shareholders, to impose upon it any policy, directive or requirement to disburse divdends or to refrain from actions which may be deemed to impair the utility's ability to pay dividends, without the prior consent of this Commission; and it is further

ORDERED that any proposed sale of Vitelco stock by ITT to ATN, or to any other prospective purchaser, which includes any of the following terms or conditions, shall not be consummated and is hereby prohibited: (a) No such sale shall provide for the use of a holding company structure except in conjunction with an express prohibi-

tion upon the holding company's participation in any venture other than the ownership and operation of Vitelco, which does or may rely in any way upon the credit or value of Vitelco as an asset of the holding company, or upon the shared services of Vitelco officers or employees, equipment or other assets, or which imposes any lien or obligation upon Vitelco, its operations, funding or assets, without the prior approval of this Commission; (b) *There shall be no sale of Vitelco stock to ATN upon the terms proposed in the documents submitted to this Commission, unless there is also submitted an irrevocable letter of credit, or fully equivalent financial guarantee on the part of E. F. Hutton in the sum of $15 million which fully complies with the requirements of PSC Order No. 7-1987, paragraph 1(c);* (c) There shall be no sale of Vitelco stock to ATN under which fees payable to purchase the option of withdrawing stockholders, or for financial advisory fees, bridge financing commitment fees, associated fees for longterm debt or preferred stock, or comparable purposes, are to be financed by debt instruments of ATN. Any such fees shall be paid by ATN from a non-debt source; and (d) Any and all representations to this Commission, made by officers, principals or attorneys of ATN, at any time, shall be and hereby are deemed binding upon ATN, notwithstanding changes in ownership subsequent to such representations; and it is further

ORDERED that in connection with any transfer of ownership of Vitelco stock by ITT to any other entity, any advisory fees which are proposed to be paid by Vitelco to such stockholder shall be subject to the prior scrutiny of this Commission to insure that they are made only for

reasonable value and are negotiated at arms length; and it is further.

ORDERED that any employment contracts entered into by Vitelco and any shareholder of Vitelco or any shareholder of ATN, should ATN become the owner of Vitelco, shall be entered into only upon reasonable terms and conditions for value and at arms length and shall be subject to review of this Commission.

Providing all the terms of this order are met by ATN, ITT and by Vitelco, and compliance with the terms hereof are certified in writing to the Commission and confirmed by the Commission's staff, the proposed sale of stock by ITT to ATN may proceed.

For the Commission,

/s/ Alphonse Adams
Alphonse Adams, Chairman

DATED: April 23, 1987

CC: Atlantic Tele Network Co., c/o Winston Hodge, Esq.
ITT, c/o Derrick W. Samuelson, Esq.
Vitelco, c/o Jack Basford

Applicable Statutes of Virgin Islands Code

Chapter 1. Public Utilities Generally

Subchapter I. Public Utilities

Section Analysis

1. Public utilities subject to regulation; definition; financial interests of members of Commission
2. Just and reasonable rates and services
3. Joint use of facilities
4. Compliance with regulations
5. Uniform accounts
6. Form of accounts prescribed by Commission
7. Office in Virgin Islands
8. Reports to Commission
9. Schedule of rates
9a. Interest on customer deposits
10. Filing of rules
11. Publication of schedules
12. Filing and publication of joint rates
13. Changes in rates
14. Filing of new schedules
15. Schedules binding
16. Inspection of records
17. Subpoena of records
18. Appointment of agents

19. Answer to inquiries

20. Investigations of rates and services

21. Notice to utility of complaint

22. Notice to utility of hearing

23. Power of Commission to fix rates and services

24. Suspension of rates

25. Expenses of investigation

26. Complaints by utilities

27. Power to administer oaths

28. Depositions

29. Records of proceedings

30. Transcript as evidence

31. Compliance with Commission rate orders

32. Changes of Commission orders

33. Petitions for reconsideration

34. Appeals

35. Questions on appeal

36. Orders to remain in effect

37. Immunity of witnesses

38. Penalty for refusal to supply information

39. Penalty for violations

40. Separate offenses

41. Liberal interpretation

42. Existing franchises

43. New franchises

44. Effective date

History

§ 1. Public utilities subject to regulation; definition; financial interests of members of Commission

(a) The following services provided by an individual, firm, co-partnership, association, corporation or other person for compensation are declared to be affected with a public interest and are defined to be a public utility subject to this chapter, and the person providing such service to be a "public utility".

117

T.30 § 1

(1) lighterage and cargo handling;

(2) dockage, wharfage, or related cargo services;

(3) telephone service;

(4) water supply services; except retail deliveries;

(5) electric power service;

(6) passenger services by motor busses or trucks.

(7) public marine passenger transportation services operating under government grant of exclusive franchise.

* * *

(b) None of the foregoing services shall be deemed to be a public utility under this chapter, when supplied by the Federal Government.

(c) The rates for public utility service supplied by the Government shall be fixed, unless fixed by law, in the same manner as rates for public utility services furnished by a private entity.

(d) As used herein, the word "Commission" shall mean the Public Services Commission of the Virgin Islands as continued and established by the provisions of section 137 of Title 3.

(e) No member of the Commission shall have any financial interest in, or be an agent or employee of, or any public utility subject to this chapter.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181; amended May 22, 1970, No. 2722, § 2, Sess. L. 1970, p. 122; July 11, 1973, No. 3460, § 2, Sess. L. 1973, p. 165. Amended Nov. 18, 1976, No. 3906, § 11, Sess. L. 1976, p. 228.

§ 2. Just and reasonable rates and services

Every public utility doing business within the Virgin Islands is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished, or rendered, shall be reasonable, just and nondiscriminatory. Every unjust or unreasonable or dis-

criminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the Commission.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

§ 16. Inspection of records

The Commission or any member thereof or any person or persons employed by the Commission for that purpose shall, upon demand, have the right to inspect the books, accounts, papers, records, and memoranda of any public utility, and to examine, under oath, any officer, agent, or employee of such public utility in relation to its business and affairs. Any person other than one of said members who shall make such demand shall produce his authority to make such inspection or examination.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

§ 17. Subpoena of records

(a) The Commission may require, by order or subpoena, to be served upon any public utility in the same manner that a summons is served in a civil action in the District Court of the Virgin Islands, the production within the Virgin Islands at such time and place as it may designate of any books, accounts, papers, or records kept by such public utility in any office or place without the Virgin Islands, or verified copies in lieu thereof if the Commission shall so order, in order that an examination thereof may be made by the Commission under its direction.

(b) Attendance of witnesses and the production of such documentary evidence may be required from any place in the United States. In case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission may invoke the aid of any court of the United States or the District Court of the Virgin Islands in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section. The said Commission is hereby given power to call on the Attorney General of the Virgin Islands to enforce the provisions of this chapter in the proper courts and in the District Court of the Virgin Islands.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

* * *

§ 20. Investigations of rates and services

Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the Commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the Commission without a formal hearing.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

* * *

§ 23. Power of Commission to fix rates and services

(a) If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this chapter, the Commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, charges, or schedules as shall be just and reasonable. If upon such investigation, it shall be found that any regulation, time schedule, act, or service, complained of is unjust, unreasonable, unsafe, inadequate, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this chapter, or if it be found that reasonable service is not supplied, the Commission shall have power to determine and substitute therefor such other regulations, time schedule, service, or acts and to make such orders respecting any such changes in such regulations, time schedules, service, or acts as shall be just and reasonable. The Commission shall have power to fix, determine and require such extensions, expansions, or increases in facilities or service as the Commission finds are in the furtherance of the public convenience and necessity, and the terms and conditions upon which the same shall be made: Provided, That no hearing shall be had and no order shall be made with respect thereto without notice to the public utility affected thereby, as provided in section 22 of this title.

(b) In exercising its authority to prescribe just and reasonable rates, the Commission shall provide a return of not less than six (6) nor more than eight (8) percent on the net investment in the property prudently acquired for and

devoted to the public use, unless the Commission makes a special finding that a different return is imperative, so as to be fair to the consumer interest, and to be fair to the investor interest by providing a return commensurate with returns in other enterprises having corresponding risks, and which will assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

* * *

§ 36. Orders to remain in effect

All orders and decisions of the Commission shall remain in full effect, except as provided in section 33 of this title, unless and until they are suspended or rescinded by the Commission or are vacated by lawful order of the District Court of the Virgin Islands: Provided, That if in any petition made to the said court appealing from an order or decision of the Commission it be alleged that substantial and irreparable financial or property loss would be occasioned to the petitioner by the operation of the said order pending the determination of the said appeal, the court shall set a time and place for hearing upon the said allegation after not less than three days' notice to the Commission (during which period the execution of the order or decision shall be stayed), and the said court may then, upon a clear showing of irreparable and substantial financial or property loss as alleged, suspend the effective date of the said order. No such suspension shall be for a greater period than sixty days without further order after notice or hearing by the court. In the event of the issuance of an order suspending the operation of any order of

the Commission, the court may include therein such provision as it deems advisable for the preservation of records or accounts and the impounding or otherwise securing of moneys necessary to give effect to the order of the Commission in the event the said order is sustained.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

* * *

§ 38. Penalty for refusal to supply information

Any officer, agent, or employee of any public utility who shall fail or refuse to fill out and return any blanks, as required by this chapter, or shall fail or refuse to answer any question therein propounded, or shall knowingly or wilfully give a false answer to any such question, or shall evade the answer to any such question where the fact inquired of is within his knowledge, or who shall, upon proper demand, fail or refuse to exhibit to the Commission or any member thereof, or any person authorized to examine the same, any book, paper, account, record, or memoranda of such public utility which is in his possession or under his control, or who shall fail to properly use and keep his system of accounting, or any part thereof as prescribed by the Commission under this chapter, or who shall refuse to do any act or thing in connection with such system of accounting when so directed by the Commission or its authorized representative shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $1,000 for each offense, and when such officer, agent, or employee acted in disobedience[1] to the direction, construction,[1] or request of

[1]So in original.

the public utility involved, said public utility in addition, shall pay a penalty of not more than $2,0000 for each offense.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

§ 39. Penalty for violations

(a) If any public utility shall violate any provision of this chapter, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it, or shall fail, neglect, or refuse to obey any lawful subpoena, requirement or order made by the Commission, or any judgment or decree made by any court upon its application, for every such violation, failure, or refusal, such public utility shall forfeit and pay to the Government of the Virgin Islands the sum of $100 for each such offense. In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any public utility acting within the scope of his employment and instructions shall in every case be deemed to be the act, omission, or failure of such public utility.

(b) The Attorney General of the Virgin Islands, at the request of the Public Utilities Commission, or its designated agent therefor, shall forthwith bring appropriate action to compel adherence to, or enjoin violations of, any lawful orders of the Commission issued pursuant to this chapter, and to recover in the name of the Government of the Virgin Islands the penalties herein provided, and the Court shall give priority to any such actions.

(c) The provisions of this section shall not apply to departments or agencies of the Government of the Virgin Islands furnishing public utility services, however, this provision shall not exempt the Government of the Virgin

Islands from claims made pursuant to Title 3, chapter 118 of the Code.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181; amended July 11, 1973, No. 3460, § 4, Sess. L. 1973, p. 165.

Amendments—1973. Subsection (c): Added.

* * *

§ 41. Liberal interpretation

The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Commission by the provisions of this chapter the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this chapter conferred on said Commission. The Commission hereby created shall have, in addition to the powers in this chapter specified, mentioned, and indicated all additional, implied, and incidental power which may be proper and necessary to effect and carry out, perform and execute all the said powers herein specified, mentioned, and indicated. A substantial compliance with the requirements of this chapter shall be sufficient to give effect to all the rules, orders, acts, and regulations of the Commission, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

§ 42. Existing franchises

Nothing in this chapter shall be construed to alter or amend the terms of any contracts or franchises governing the provisions of public utility services, issued or entered into priority to January 1, 1965.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

Act No. 5258, Amending the V.I.C. Granting Jurisdiction to the PSC, Effective May 19, 1987

ACT NO. 5258

BILL NO. 17-0046

SEVENTEENTH LEGISLATURE OF THE
VIRGIN ISLANDS OF THE UNTED STATES
Regular Session
1987

To require the approval of the Public Service Commission for the acquisition or control of public utilities

———o———

BE IT ENACTED by the Legislature of the Virgin Islands:

SECTION 1. Title 30, Chapter 1, Virgin Islands Code, is amended by adding a new Section 43a to read as follows:

"Section 43a. *Acquisition or control of Public Utility: approval of Commission*

(a) No person or corporation, whether or not organized under the laws of the Territory, shall sell, acquire or transfer control, either directly, or indirectly of any public utility organized and doing business in this territory, without first securing authorization from the commission. Any such acquisition or control without prior authorization shall be void and of no effect.

(b) No public utility incorporated under the laws of this Territory shall sell, nor shall any such public utility make or permit to be made upon its books any transfer of any share or shares of its capital stock, unless authorized to do so by the commission. Nor shall any public utility incorporated under the laws of this Territory sell any share or shares of its capital stock or make or permit any transfer to be made upon its books, to any corpora-

tion, domestic or foreign, or any person, the result of which sale or transfer in itself or in connection with other previous sales or transfers shall be to vest in such corporation or person a majority in interest of the outstanding capital stock of such public utility corporation unless authorized by the commission.

(c) Where, by the proposed transfer of control, sale, assignment, contract, or agreement for assignment or transfer of capital stock, as set forth in this Section, it appears that a public utility or a wholly owned subsidiary of a public utility may be unable to fulfill its obligation to any employee with respect to pension benefits previously enjoyed, whether vested or contingent, the commission shall not grant its authorization unless the public utility, and/or the prospective stockholders thereof, seeking the commission's authorization, assume such responsibility and provide such assurance as will be sufficient to insure that all such obligations to employees will be satisfied as they become due.

Thus passed by the Legislature of the Virgin Islands on May 18, 1987.

Witness our Hands and the Seal of the Legislature of the Virgin Islands this 18th day of May, A.D., 1987.

/s/ Iver A. Stridiron
IVER A. STRIDIRON
President

/s/ Virdin C. Brown
VIRDIN C. BROWN
Legislative Secretary

(SEAL)

The above bill is hereby approved.

Witness my hand and the Seal of the Government of the Virgin Islands of the United States at Charlotte Amalie, St. Thomas, this 19th day of May, A.D., 1987.

/s/ Alexander A. Farrelly
Alexander A. Farrelly
Governor

(SEAL)

Excerpt from the Transcript of PSC Proceedings on April 21, 1987, Dealing with the Adoption of PSC Order No. 22-1987

V.I. PUBLIC SERVICES COMMISSION
P.O. BOX 40
ST. THOMAS, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE SALE OF VIRGIN ISLANDS TELEPHONE CORPORATION STOCK TO ATLANTIC TELE-NETWORK COMPANY	)))))	DOCKET NO. 301

Transcript of Proceedings of Executive Session
April 21, 1987
Commenced at 10:40 a.m.

Held in the Assembly
Hall, Bluebeard's Castle
St. Thomas, V.I.

BEFORE COMMISSION MEMBERS PRESENT:

ALPHONSE ADAMS, Chairman

GEORGE C. PARROTT, Vice-Chairman

ALFRED B. HAYES, Commissioner

VALDEMAR A. HILL, JR., Commissioner

HECTOR L. RIVERA, Commissioner

SEN. HOLLAND L. REDFIELD II, Commissioner, Ex-officio

SEN. ALLAN PAUL SHATKIN, Commissioner, Ex-officio

PATRICK M. RICE, Executive Director

APPEARANCES:

FOR PSC:

MARIA T. HODGE, ESQ., Counsel for PSC
JAMSHED K. MADAN, Consultant for PSC

For Vitelco:

SAMUEL SUGDEN, ESQ., Counsel for Vitelco
DERRICK SAMUELSON, ESQ., Counsel for ITT
JACK W. BASFORD, President for Vitelco

* * *

(p. 259) The Chairman: Any comments from any of the commissioners?

Mr. Hayes: I would make a motion that an order be forthcoming from the Commission to encompass the points made by counsel and staff.

The Chairman: At this point, I think best interest would be served if the Commission goes in Executive Session as provided by the Sun Shine Law of the Virgin Islands.

So, I would request that the inner portion here be left to the members of the Commission and the staff and that the outer portion be utilized by all others.

[Hearing recessed]

[Executive Session]

Public Hearing resumes 9:00 p.m.

The Chairman: We are ready to resume the hearing.

The Commission has closed its Executive Session and is now back in regular session.

We will have a motion made with respect to the position taken by the Commission in Executive Session.

Mr. Hayes: I would make a motion, Mr. Chairman, that the Commission issue an order or orders to Vitelco or Atlantic, ATN, or both of them to encompass the points that counsel and staff have (p. 260) recommended to the Commission. This would be issued as soon as possible.

The Chairman: Second the motion?

Mr. Rivera: I second the motion.

The Chairman: Discussion on the motion?

We'll proceed to vote on the motion by call of names. Commissioner Parrott.

Mr. Parrott: In favor.

The Chairman: Commissioner Hayes.

Mr. Hayes: Aye.

The Chairman: Commissioner Hill.

Mr. Hill: Yea.

The Chairman: Commissioner Rivera.

Mr. Rivera: Yes.

The Chairman: My vote is also yea.

So it's unanimous that we support the position taken by our counsel and staff.

The Commission will have two orders or an order of two orders prepared by our counsel that will reflect the issues and decisions made by the Commission.

Atty. M. Hodge: Very well. Mr. Chairman, I will be glad to prepare the order and submit it to you.

Atty. W. Hodge: May re enquire as to when that will be done.

(p. 261) Atty. M. Hodges: I'll try my best tomorrow.

The Chairman: I think that completes action for this long day and it is 9:00 now.

The hearing on Docket 301 is closed as of this time, subject, of course, to the preparation of the orders.

So, we would like to thank all the participants and all who were here at the hearing.

[Concluded 9:05 p.m.]

[Certified to be a true recording and transcription of the foregoing matter, pages 1-261]

/s/ Dolores T. Stephen-Rivas
DOLORES T. STEPHEN-RIVAS

PSC Order No. 25-1987 Moving May 22, 1987, PSC Meeting to June 9, 1987

PUBLIC SERVICES COMMISSION
P.O. BOX 40
CHARLOTTE AMALIE, ST. THOMAS, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE SALE OF STOCK OF THE VIRGIN ISLANDS TELEPHONE CORPORATION	)	PSC DOCKET NO. 301
	)	ORDER NO. 25-1987

WHEREAS the Virgin Islands Public Services Commission, by Order No. 24-1987, had scheduled a hearing on this matter for May 22, 1987, provided that all interested parties elected to waive the ten day notice requirement; and

WHEREAS Atlantic Tele-Network Co. declined to waive the ten day notice requirement, and accordingly an adjourned hearing date is necessary to comply with Atlantic Tele-Network Co.'s right to ten days notice of such a hearing, and the Commission being duly satisfied in the premises, it is hereby

ORDERED that the hearing in this matter previously scheduled for May 22, 1987, shall be and the same is hereby rescheduled to the 9th day of June, 1987, at 10:00 AM at Bluebeards Castle Hotel, and all interested parties are hereby notified to appear at the place and time for further proceedings in this matter.

For the Commission,

/s/ Alphonse Adams
Alphonse Adams, Chairman

Dated: May 22, 1987

cc: Atlantic Tele-Network Co., c/o Winston Hodge, Esq.
ITT, c/o Derrick W. Samuelson, Esq.
VITELCO, c/o Jack Basford.

Swoboda Statement—A Comparison of the PSC's Chief Counsel's Statements in Her Brief to the Third Circuit to the Actual Statement of Swoboda

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appeal No. 87-3485

ATLANTIC TELE-NETWORK CO. APPELLEE

vs.

THE PUBLIC SERVICES COMMISSION
OF THE VIRGIN ISLANDS, and
PATRICK M. RICE, Executive
Director of the Public Services
Commission APPELLANT

ON APPEAL FROM THE DISTRICT COURT OF
THE VIRGIN ISLANDS DIVISION OF
ST. THOMAS AND ST. JOHN

Civil No. 1987-257

APPELLANT'S BRIEF
Maria Tankenson Hodge, P.C.

By: Maria Tankenson Hodge
P. O. Box 4511
St. Thomas, V.I. 00801
(809) 774-6845

* * *

RESPONDENT'S BRIEF TO THE THIRD CIRCUIT
SEPT. 21, 1987, EXCERPT FROM P. 12

If, upon its investigation, the PSC found any act or service unreasonable, inadequate, or otherwise in violation of any of the provisions of the law, the Commission had the power to make such orders respecting

any such acts as were just and reasonable. 33 V.I.C. § 23. Here the Commission made those findings, and, indeed, ATN *conceded* before the Commission the rightness of at least one of the Commission's concerns in this regard. (See discussion infra at p. 15)

* * *

RESPONDENTS' BRIEF SUBMITTED TO THE THIRD CIRCUIT SEPT. 21, 1987, EXCERPT FROM PP. 15-16

In fact, after the Commission's consultant revealed the consequences and financial implications of the proposed sale financing terms in his testimony and written report, a principal and the attorney for ATN agreed "[T]hat the restrictions imposed by the prospective lender in this case are just too restrictive with respect to the public utility, Vitelco . . . . the restrictions placed upon the public utility, Vitelco, by the prospective lender are just too heavy a load to permit the ordinary kind of flexibility and ability to conduct business by the public utility, so that it can be deemed to be in a posture where it can provide service to the public that is reasonably priced, appropriately priced and is a very good service." (See Transcript of Public Hearing of PSC, App. A-372)

Thus, not only was there testimony during the course of the proceedings that, should the sale of Vitelco stock be consummated under the terms proposed by ATN and its third party financer, the implications would be detrimental to the rate payer, but ATN agreed. With this determination that rates and services would be affected, the jurisdiction of the PSC over the proposed sale is well founded and supported by the above referenced authority and the PSC's statutory grant.

Notwithstanding this factual record, the District Court held that ATN was entitled to judgment as a matter of law holding the Commission lacked jurisdiction to approve or condition the sale of stock under Title 30, as it stood prior to enactment of Act 5258, and proceeded to declare the Commission's order void. This ruling by the District Court was an erroneous reading of the law, where the facts showed direct adverse effects of the terms of sale on the regulated utility and should be reversed.

* * *

PUBLIC SERVICES COMMISSION
P.O. Box 40
ST. THOMAS, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE APPLICATION OF THE VIRGIN ISLANDS TELEPHONE CORPORATION FOR A CHANGE IN RATES	)	PSC DOCKET NO. 277
IN THE MATTER OF THE SALE OF VIRGIN ISLANDS TELEPHONE CORPORATION STOCK TO ATLANTIC TELE-NETWORK COMPANY	)	DOCKET NO. 301
IN THE MATTER OF THE VIRGIN ISLANDS TELEPHONE CORPORATION DEREGULATION OF INSIDE WIRE	)	PSC DOCKET NO. 304
IN THE MATTER OF THE VIRGIN ISLANDS TELEPHONE CORPORATION LIFELINE RATES	)	PSC DOCKET NO. 305

VOL. I

TRANSCRIPT OF PUBLIC HEARING
February 5, 1987, 10:17 a.m.

Held in Conference Room of
the V.I. Legislature
Christiansted, St. Croix,
U.S.V.I.

BEFORE COMMISSION MEMBERS PRESENT:

ALFRED B. HAYES, Chairman

ALPHONSE ADAMS, Vice-Chairman

VALDEMAR A. HILL, JR., Commissioner

HECTOR L. RIVERA, Commissioner

GEORGE PARROTT, Commissioner

SENATOR HOLLAND L. REDFIELD, Commissioner ex-officio

PATRICK M. RICE, Executive Director

APPEARANCES:

MARIA T. HODGE, Esq., Counsel to PSC
JAMSHED K. MADAN, Consultant to PSC

* * *

SETTING—FEBRUARY 5, 1987

Mr. Jamshed K. Madan, the PSC's chief consultant, had spent all morning testifying against the First Chicago loan proposal. ATN did not offer any opposing testimony. Rather, Mr. Craig Swoboda stood up and made a conciliatory statement that in essence delivered one message: rather than get into an adversarial posture why don't we sit down and see if we can negotiate our differences. It is that statement that has been the subject matter of the PSC's Chief Counsel Briefs. In fact, negotiations did ensue as a result of Mr. Swoboda's statement.

* * *

(p. 75) AFTERNOON SESSION

The Chairman: At this time the Virgin Islands Public Services Commission will reconvene at its hearing on Docket 301 and at this time Mr. Madan is on the stand and the purchasing group is about to question him any way they see fit in relation to his testimony.

Mr. Swoboda: Mr. Chairman & members of the Commission, I was at the last hearing and you may remember I represent prospective purchasers and as I told you, I am also one of them. Also, as I told you at the last hearing

and I still mean it, irrespective of the question of the commission's jurisdiction, it is not the intention of the purchasers to take unilateral action contrary to this commission and face some unknown period of time of antagonism with this commission. It is just not our goal. We are not interested in that. At the same time, I think I mentioned at the last hearing that that little speech of mine which I truly mean is not to be interpreted as a concession of the commission's jurisdiction. That is a separate matter as I see it.

Our goal right now is to get into a legal posture. Our goal right now is to try to see whether this transaction can be consummated between this particular seller and this particular purchaser. In this case, the particular seller is ITT, the sole shareholder of Vitelco. The purchaser in this case is Atlantic Tele-network company, which is the prospective sole shareholder of (p. 76) Vitelco.

We have had the benefit of Mr. Madan's testimony this morning and his report. And I have to say again personally that much of what he says makes some sense. At the same time, I don't want that to be misinterpreted to mean that I agree with every point of view that he has expressed to the commission, because I don't.

What I come away from this morning is hearing what is really this. It is anticipated in the purchase of stock of a utility or even in the case of a public utility, that it may have some debt. Indeed, even Mr. Madan has conceded that point this morning that the utility may have debt. I don't think it's an unreasonable assumption to make. I think it's within the experience of all members of the commission, probably everyone in the room, that if

a borrower has debt, his lender is going to put some restrictions on that debt, of some sort. So, what I conclude from this morning's hearing is that the restrictions imposed by the prospective lender in this case are just too restrictive with respect to the public utility Vitelco, irrespective of the holding company, which is really a separate matter. But the restrictions placed upon the public utility Vitelco by the prospective lender are just too heavy a load to permit the ordinary kind of flexibility and ability to conduct business by the public utility, so (p. 77) that it can be deemed to be in a posture where it can provide service to the public that's reasonably priced, appropriately priced, and is a very good service.

I realize that there are one or two other issues that were raised this morning. I don't find those to be, if you will, fighting issues. I find the fighting issues to be the question of what kind of rational restrictions can a lender to a public utility place upon that utility and still give that utility the kind of business posture which will permit it to provide good and valuable service to the public at an appropriate rate.

Now in that context then, it seems to me that what we have to deal with is the questions of the restrictions imposed by the prospective lender in this case and their effect upon Vitelco.

I would urge the commission not to take a precipitous kind of action that says that they disapprove this transaction at all. I would request that the commission give the prospective purchaser of Vitelco's stock in this case, an appropriate opportunity to discuss the matter in sincerity and in good faith with the commission's staff, with an eye towards trying to come to some kind of rational restric-

tions which I think everybody would agree could be permitted. Some kind of rational restrictions that would not impose too difficult a burden upon the public utility. (p. 78) And what I would like to do is pose to Mr. Madan two questions: Number one, does he think that's a rational appratch to this problem, and number two, does he have any suggestions about what those livable, if you will, permissible restrictions might be in a case like this.

Mr. Madan: I would think that within reason that would be a reasonable approach with the following thoughts and caveats and that is that I think certain guidelines can be discussed. The problem is that the guideline, I think, would serve perhaps as a starting point to obtain a final document and it's only in the context of really looking at all the assumptions that go into the document that an overall conclusion can be reached.

Certainly if you look at one extreme, it seems to be pretty clear that if the transaction was consummated without any debt, there would be no problem—I think we all agree with that—and everyone understanding that the prospective buyers are contemplating that some level of debt be imposed. Again, I don't talk for the commission, although I don't presume to, but in terms of a proposed assessment and one that the Chairman spoke about this morning, what I would say, as a starting point, would be approximately what would be the conditions on which an ongoing utility would face. I would think of three that would be extremely common to a utility financing. One, (p. 79) that debt be limited, I believe, to a ratio of some sixty percent of company's bonds, or property.

Number Two. A reasonable debt equal equity ratio be maintained, which I would define somewhere between

forty and sixty percent of its capital structure, and that's not the entire right hand of the balance sheet, but in this case it would be forty-five to fifty million dollars of equity. And see under those conditions there's usually some restriction on the company's ability to finance in the future and those usually say that under these conditions the borrowers expect that the company will obtain a minimum coverage on the 2.0 times which generally allowed you these sort of restrictions externally financed in the—I see that as part of the starting point and what proposed buyers wanted to do, and I also can see a big gap within that and where you are. What I find is we can sit and talk about bridging the gap, but I presume that's something you all would have a great deal more input into it than we.

Mr. Swoboda: I agree with you, Mr. Madan. My only point is that in light of all the circumstances in this matter, rather than attempting to find appropriate restrictions coming to you, having you say yes and going back and so forth, that we abbreviate I think, a good deal of that trial and error approach by getting together with (p. 80) you. I appreciate what you conclude is not necessarily what the commission will conclude. I understand that. At the same time, I understand that you are in deed an advisor to the commission and they certainly rely upon you to at least give them direction in the matter. What I was proposing is that you and the prospective purchasers and perhaps counsel for the commission and anyone else that would care to be involved, instead of going through a trial and error method of saying we might achieve this and you say yeah or nay, that we can get together and try to arrive at what those appropriate restrictions might bet.

There's only one matter I want to clarify and that was when you talked about 2.0 to one, were you talking cash flow to debt service?

Mr. Madan: It would usually be defined as a pretax coverage. And that would generally be income available before interest and taxes divided by interest. And generally with those ratios, at least on a proforma basis, Vitelco should be well in excess of three times with the debt level of about twenty-five milion dollars. That should not be a problem. In other words, there will be additional outside financing capability, should the need arise, Vitelco would maintain its integrity. What I recognize is that gap between those numbers and the sales price—

Mr. Swoboda: I recognize there's a gap as well. (p. 81) But what I am suggesting here is that rather than just come to a conclusion today that the entire transaction is disapproved in light of what is in truth a considerable amount of time, effort, and money already expended in the transaction, rather than just to say let's forget it, let's disapprove the transaction. I would like to make a run at trying to achieve what you would deem to be the kind of restrictions that you could recommend to this commission. I don't think under all the circumstances that's an unreasonable position to take.

Mrs. Hodge: Excuse me, Mr. Chairman. If I could, from a legal point of view, the one concern that I would have with that effort is that we were told that there is at present a contract between a prospective buyer and a prospective seller with a fixed cut-off date proposing and at

the present time there's no commission order in effect that tells anybody really to do anything about a sale. Without such order, and in the face of such a contract, the risk to the commission would be that in time we are devoted to seeing whether staff recommendations could be developed that would be in accordance with what the lender is willing to do and the purchaser is willing to accept, that in fact the transaction would close.

Mr. Swoboda: What I tried to say in my opening statement that probably wasn't very articulate. It's (p. 82) not our intention to take that approach. It's not our intention to close this transaction in the present light.

Mrs. Hodge: If there were a stipulation in effect that the transaction would not close while this process was taking place so that the possibility of the commission choosing to exercise its discretion on the subject is mentioned and the report were protected, then I would not have a legal problem with that. I don't know whether you need ITT's consent to—

Mr. Swoboda: Let me poll the delegation, if I can, and see.

The first thing that needs to be said, I suppose, is that what I was contemplating if we could get on with this expeditiously and not have any tenuating period of time.

Mrs. Hodge: That's naturally something you strive for, but considering what it takes to get the commission convened and the fact that people come from distant quarters, if there were an amended recommendation, supplemental recommendation to offer the commission, I would not at least feel comfortable being in a position if it

couldn't be achieved, if there couldn't be a medium for the commission to give a number of days, either that you had lost your transaction certainly by default or that the commission had lost an opportunity which it may wish. . .

* * *

PSC Findings of July 7, 1988, in re Docket 316, Resulting in a Rate Decrease to Vitelco

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNITED STATES
PUBLIC SERVICES COMMISSION

FINDINGS

Thursday, July 7, 1988

In Re:)
)
PSC DOCKET NUMBER 316)
)
In the Matter of:)
)
VIRGIN ISLANDS TELEPHONE)
CORPORATION 1987 RATE CASE)

MEMBERS PRESENT

ALFRED B. HAYES, Acting Chairman
ALPHONSE ADAMS, Member
MADALINE SEWER, Member
HECTOR L. RIVERA, Member

STAFF PRESENT

PATRICK RICE, Executive Director
MARIA TARKENSON HODGE, Legal Counsel
JAMSHED K. MADAN, Consultant

For Vitelco: CORNELIUS B. PRIOR, JR., Chairman of Board

JEFFREY J. PROSSER, President
PAUL J. BERMAN, ESQ., and
EDITH L. BORNN, ESQ. and
MARY ELLEN O'CONNELL, ESQ.,
Legal Counsel

(p. 2) FINDINGS:

The Chairman: At this time, the Public Services Commission will open in open session at its special meeting and announce that it has been in executive session and has reached some conclusions concerning Docket Number 316. And in the interest of clarity and brevity, the findings of the Commission will be read by our counsel.

Ms. Hodge: Mr. Chairman, according to my notes of the Commission's decision, the most useful way to put this on the record would be to begin with the schedule, with Schedule 4, page 1, of Mr. Madan's prefiled testimony which is the methodology the Commission used as to the ordering of the decisions.

According to my notes—

Ms. O'Connell: Could you give me one second so I could follow along.

(PAUSE)

Ms. Hodge: According to my notes the Commission accepted the positions of the following witnesses, treating them in the order in which they appear in this schedule.

The Commission accepted Mr. Madan's entries numbered 1, 2 and 3. Beginning with item number 4 labeled (p. 3) "Year End Annualization", the Commission voted to accept Vitelco's position and delete the staff's proposed reduction.

According to my notes the Commission accepted Mr. Madan's proposed adjustment number 5 labeled "Universal Service Fund". As to item number 6, "Directory Revenues", according to my notes the Commission voted to

adopt a twenty percent anticipated increase in annual directory revenues as against Mr. Madan's proposal of twenty-five percent increase and as against Mr. Price's suggested sixteen percent, finding this estimated increase to be very conservative.

Mr. Madan's proposed adjustment number 7, "Inside Wire", was accepted by the Commission. Mr. Madan's proposed adjustment, number 8, "Salary and Wages", was not accepted by the Commission and that proposed adjustment should be deleted.

The net effect of this finding would be that all salaries and wages as shown by the Company are accepted by the Commission for ratemaking purposes.

Item number 9 on this schedule, "Rate Case Expense", the Commission's vote was to accept the corrected schedule of expenses which showed a correction to the legal fee actually paid to Labiff-Lamb (photetics) as well as some additional fees not shown on the original (p. 4) exhibit to Covington & Burling and having accepted that corrected statement of fees and expenses paid, to allow a total rate case expense of $600,000.00 as against the recommended level of staff of $400,000.00 and to direct that this rate case expense of $600,000.00 be amortized over a period of two and a half years.

My notes indicate the Commission voted to accept the Commission's staff recommendation on depreciation expense as shown on line 10 of Mr. Madan's schedule on page 1, and to accept the proposed adjustment at line 11 for management fees or advisory fees which is to say not to allow such fees.

The Commission voted to accept the recommendations of its staff as shown on line 12, "Additional Compensation", which is the executive compensation adjustment.

The Commission voted to accept staff's recommendation at line 13 for the proper treatment of the item designated "USOA".

The Commission voted to accept the staff's recommendation for item 14, "The Regulatory Issue". Voted to accept the staff's recommendation for treatment of Deregulated Operations and Separations as shown on line 15, as well as the recommendation of the Commission's staff on item 16, "Gross Receipts Taxes" (p. 5) be adjusted in the Company's favor.

My notes indicate that the Commission voted to accept that tax recommendation that the local portion of the telephone company's tax subsidy granted by the IDC should be reflected in rate reductions. And my notes indicate that the Commission instructed that the Commission's staff be directed to draft a proposed plan to institute a lifeline program as well as a Link-Up America program which would be funded at the level of approximately $400,000.00 per annum of the rate reduction that will flow from this decision.

Ms. O'Connell: I'm sorry. Could you repeat the last sentence.

Ms. Hodge: That the Commission directed the staff to prepare a proposed plan to implement a lifeline and Link-Up America program to be funded at the level of $400,000.00 per annum from the rate reduction which is anticipated to flow from this decision.

My notes also indicate that the Commission indicated that with respect to the staff's recommendations about possible overcharges to customers of Vitelco who have been leasing customer premises equipment under the provisions of Docket Number 256, the Commission indicated it would treat that by a separate order.

(p. 6) My notes indicate the Commission wished its decision to reflect a directive to the telephone company that it wished to institute a requirement that Vitelco file with the Commission within sixty days information sufficient to permit the Commission to determine the feasibility of implementing a 911 emergency number system. The information to be filed with the Commission by Vitelco should include information on the cost of the equipment that would be required to institute the system as well as any related expenses to Vitelco in instituting or servicing the equipment, the time needed to institute the system from any revenue requirements to Vitelco associated with instituting the program and a proposed tariff, if any, together with an indication of any problems that Vitelco anticipates may arise in connection with instituting this program.

My notes of the Commission's decision indicates its decision to accept the recommendation of Mr. Lelash to adopt a capital structure for Vitelco of one hundred percent debt, allowing a rate of return of nine percent on debt. My notes indicate the Commission determined to accept the Separation testimony of Mr. Dunkel except that it determined to accept the correction described by Mr. McDaniel in his testimony associated with category 6 in

favor of the telephone (p. 7) rate payers in the amount of $294,000.00.

My notes indicate that the Commission indicated that any of the rate making issues treated in the testimony not specifically described above, may wish to adopt the recommendations of the staff, of the Commission's staff.

Ms. O'Connell: Could you just repeat when you said, "Dunkel's Separation". I didn't get the dollar amount.

Ms. Hodge: Dunkel's separation except to accept the testimony of Mr. McDaniel with respect to the correction for the item designated "Category 6" in favor of the ratepayers in the amount of $294,000.00.

My notes indicate that the Commission directed that the staff be requested to prepare a proposed tariff to implement this decision based on the correct number of telephone units actually in use as of the end of 1987 in accordance with the testimony received in this proceeding. In addition, my notes indicate that the Commission directed that an order be entered in connection with this proceeding based on the testimony taken requiring Vitelco not to transfer any further assets to affiliated companies without the prior approval of the PSC.

The Commission also indicated that the (p. 8) order should provide that Vitelco should hold in escrow any dividends or management or advisory fees payable to its affiliates until completion of court proceedings in the case of ATN vs. the PSC or until the PSC gives prior approval of such disbursements, whichever may come later.

Ms. O'Connell: I have to ask you to do it again; it is all very complicated. Could you repeat your last—paragraph.

Ms. Hodge: The Commission directed that an order should be entered requiring Vitelco to hold in escrow any dividends and management or advisory fees payable to affiliates until completion of court proceedings in the case of ATN vs. the PSC, or until the PSC grants approval to such disbursements, whichever is later.

The Commission indicated that an order should be entered reserving the right to the Commission to examine further the transaction described in the testimony under which certain assets of Vitelco were purported to be transferred to a separate affiliated corporation identified as Vitelcom and to determine whether there are any rate implications of that transfer.

Ms. O'Connell: I am sorry, could you repeat the first sentence of that.

Ms. Hodge: The Commission directed that it will reserve the right to examine further the matter (p. 9) of the transaction described in testimony in this proceeding concerning the apparent transfer of assets from Vitelco to the corporation described in the Commission proceeding as Vitelcom to determine whether there are any rate implications in that transaction.

And the Commission also indicated that it wishes to reserve the right to investigate further the reasonableness of the utility's insurance expense to determine whether there are any appropriate rate implications of that expense.

My notes indicate that the Commission also indicated its desire that the order specify that Vitelco and ATN notify the Public Services Commission in advance in the

event of a proposed sale of a material interest in ATN or Vitelco and provide details of any such transaction to the Commission in advance of its consummation.

It was my understanding at the conclusion of the executive session that the Commission desired that we prepare a brief form of proposed order on an immediate basis denying the requested increase in rates such that it could be entered within the time limits of the Code and then drafting a more detailed order setting forth the Commission's decision in each case adopting the testimony of the supporting witnesses whose position was (p. 10) adopted as the Commission's basis for a decision and calculating the precise revenue effects of each of these decisions, which order will then be reviewed by Vitelco for mathematical correctness and submitted to the Commission for approval.

My notes are in several places as the Commission went along, Mr. Chairman. I believe I covered everything you instructed me about but if any of the Commission remembers any other matters you discussed, obviously it will be entirely appropriate to add that.

Mr. Chairman: Well, I can't think of anything. What I ask is, the Commission has heard the report of the Minutes, the Notes that counsel has taken, and I would like a motion to the effect that those clearly represent what we had discussed and decided on in executive session.

Ms. Sewer: I move that we accept the Notes as read, that they are representative of the decisions that were made in executive session.

Mr. Adams: Second it.

The Chairman: Any comments? All in favor signify by "Aye".

Chorus of "Ayes".

The Chairman: It is unanimous.

(p. 11) That is the decision of the Commission on the matter of Docket Number 316. There was a matter of a cease and desist order that we had continued and I wonder if any of the Commission has an opinion.

Ms. O'Connell: I am not aware of any cease and desist order.

The Chairman: Show cause order. A show cause order. I would like to know if any of the Commission has a suggestion as to what we should do, any proposal as to what to do with this?

Ms. Sewer: I move that the show cause order be declared moot by the Commission.

Mr. Rivera: I second the motion.

The Chairman: All in favor?

(Chorus of "Ayes")

The Chairman: The show cause order that was previously issued becomes moot after the conclusion of 316 and so, the Commission no longer needs to proceed along those lines.

Is there anything else that should come before the Commission at this special meeting?

Ms. Hodge: Nothing further than I am aware of.

The Chairman: If there is nothing more to come before the Commission at this time, the Commission (p. 12) declares—adjourns the special meeting of July 7th.

This document is hereby certified to be a true and correct transcript of the foregoing proceedings.

/s/ Theodore M. Dorsett, Cm
Theodore A. Dorsett, Cm

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-643

In The
Supreme Court of the United States
October Term, 1988

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands Corporation,

Petitioner,

v.

THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS, PATRICK M. RICE, EXECUTIVE DIRECTOR OF THE PUBLIC SERVICES COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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November, 1988

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or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Does the issuance of a declaratory judgment and permanent injunction by a district court, enjoining enforcement of a territorial law respecting regulation of utilities, which is subsequently held erroneous on appeal and reversed, immunize conduct prior to reversal on appeal from enforcement of the valid territorial law, so as to render the controversy moot?

2. Does the Virgin Islands Public Services Commission have jurisdiction to regulate the sale of a territorial public utility's stock under V.I. CODE ANN. tit. 30, §§ 1-44 (1986)?

3. Does Virgin Islands law, conferring upon the territorial Public Services Commission the jurisdiction to regulate sales of stock of public utilities incorporated in the territory, constitute an impermissible restraint on interstate commerce?

TABLE OF CONTENTS

PAGE

STATEMENT OF FACTS 2

REASONS WHY THE WRIT SHOULD BE DENIED 7

I. THE MATTER IS NOT MOOT 7

II. THE VIRGIN ISLANDS STATUTES WERE NOT MISCONSTRUED BY THE COURT OF APPEALS 9

III. NO IMPERMISSIBLE RESTRAINT ON INTERSTATE COMMERCE ARISES FROM THIS STATUTE 12

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

CASES

Board of Governors of the Federal Reserve System v. Dimension Financial Corp, 474 U.S. 361 (1986) 9

Edgar v. Mite Corp., 457 U.S. 624 (1982) 8, 9, 12, 13

Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F. 2d 1103 (3d Cir. 1985), cert. denied 475 U.S. 1013 (1986) 7, 8

Louisiana Public Services Comm. v. FCC, 476 U.S. 355 (1986) 13

Natural Resources Defense Council, Inc. v. U.S. EPA, 683 F.2d 752 (3d Cir. 1982) 7

STATUTES

V.I. CODE ANN. tit. 30, § 2 (1975) 10

V.I. CODE ANN. tit. 30, § 39 (1976) 7

V.I. CODE ANN. tit. 30, § 41 (1975) 10

V.I. CODE ANN. tit. 30, § 43a (1975) 5

1987 V.I. Acts 5258 5

No. 88-643

In The

Supreme Court of the United States

October Term, 1988

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands Corporation,

Petitioner,

v.

THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS, PATRICK M. RICE, EXECUTIVE DIRECTOR OF THE PUBLIC SERVICES COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Public Services Commission of the Virgin Islands, and Patrick M. Rice, Executive Director of the Public Services Commission respectfully ask the court to deny the petition for a writ of certiorari for the reasons set forth below.

STATEMENT OF FACTS

Atlantic Tele-Network Company (hereinafter ATN) challenges the authority of the Public Services Commission of the Virgin Islands (hereinafter PSC) to regulate the sale of the stock of the Virgin Islands Telephone Corporation (hereinafter Vitelco) to ATN.[1] Vitelco is the only operating telephone company in the U.S. Virgin Islands. It was created in 1959 as a wholly owned subsidiary of the International Telephone and Telegraph Company (hereinafter ITT) pursuant to an agreement between the Government of the Virgin Islands and ITT. The 1959 agreement prohibited the transfer of Vitelco's

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[1]This statement of facts is taken, for the most part, directly from the opinion of the court of appeals. The Petition, on the other hand, is replete with statements having absolutely no basis in the record, including claims about what other nations in the Caribbean are allegedly doing with respect to utilities, Petition p. 16, n.12, claims the Virgin Islands' "two critical problems are the lack of insufficient private employment (sic) and a weak infrastructure," (quoting an unnamed source answering a question in an appendix to a Senate report from 1983) Petition, p. 15, and an extended and highly distorted discussion of now pending rate cases in which no final order has been entered.

There are also contentions in the Petition about settlement discussions, which, in addition to being incorrect in many respects, obviously do not belong in a Petition for Certiorari. Additionally, there are editorial comments or arguments included in the appendix, presented as if part of the original document, without any indication they have been authored by the petitioner and are not a part of the authentic record. See Appendix p. 63, where the first paragraph appearing in text of a transcript has apparently been created by Petitioner and inserted as part of its argument.

stock for a period of five years,[2] and required Vitelco to sign a franchise agreement that included a prohibition against transfer of the franchise without the consent of the PSC.

On January 9, 1987, ITT entered a Stock Purchase and Sale Agreement in which it agreed to sell all the shares of Vitelco's capital stock to ATN, a corporation that had been formed by a group of investors for the purpose of acquiring and controlling Vitelco.

The PSC learned of this agreement and attempted to exercise its regulatory authority over Vitelco by imposing conditions on the terms of the stock sale. The PSC noted concern over the proposed sale both because the prospective purchasers appeared to lack any experience with an operating telephone company and because the proposed financing, which was a leveraged buyout in essence, appeared to pose substantial risks for the utility's financial situation. The PSC held several hearings beginning in January, 1987, and entered several orders setting forth its conditions for approving the sale. During this process there were several changes in the identity of the proposed purchasers and in their financing proposals.

On April 23, 1987, the PSC issued an order which concluded that certain terms of the sale, relating primarily

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[2]The provision stated:

> That, for a period of at least five (5) years from the date of such assignment, [ITT] will not relinquish majority stock control of [Vitelco], and [Vitelco], by its acceptance of the assignment of this agreement warrants that it will not, within the said five year period, sell its capital stock in such manner as to transfer stock control to any party other than [ITT].

App. at A 311 § 1(d)

to financing, threatened the economic viability of Vitelco, and directed that the sale not be consummated unless certain conditions were satisfied. The primary difficulty identified by the PSC was that of a purchase price of approximately $98 million, when the utility's book value was only approximately $60 million and ATN was to put up only $15.5 million in equity and borrow the remaining $82.5 million from its principal stockholder using the assets of Vitelco as collateral.

In order to insure that ATN would be able to pay its indebtedness to its principal stockholder, the agreement of sale called for the imposition of several restrictions on Vitelco. First, there was to be a "negative pledge of assets," under which Vitelco, for the duration of ATN's loan, would be foreclosed from pledging any of its assets to obtain additional capital, with the sole exception that Vitelco could execute purchase money mortgages in connection with purchases of new equipment. Second, for the duration of the loan, Vitelco was to take no action that would restrict Vitelco's ability to pay dividends to ATN. These restrictions led the PSC to conclude that

> inasmuch as Vitelco will be ATN's sole source of repayment of its $80 million debt, as well as its mandatory 12% annual dividend to preferred shareholders, there will be an unavoidable financial harm to Vitelco, including an immediate negative effect on retained earnings, and a negative cash flow by 1994, with a consequent upsurge in pressure to sacrifice reasonable capital investment requirements and prudent maintenance and operation expense obligations. Further, since the Vitelco stock is pledged as security for the debt, default would result in a chaotic situation for the utility.

App. at pp. 35-36.

While the PSC proceedings were in progress, ATN contended that the PSC lacked jurisdiction to review or condition the sale of stock. The Attorney General of the Virgin Islands issued an opinion confirming the agency's jurisdiction. In light of this dispute the territorial legislature determined to pass a clarifying amendment to the code to confirm the PSC's authority in such matters. Accordingly, on May 18, 1987, the Virgin Islands Legislature enacted Act No. 5258, which was duly signed into law by the Governor. This statute provides:

> No person or corporation, whether or not organized under the laws of the Territory, shall sell, acquire or transfer control, either directly, or indirectly of any public utility organized and doing business in this territory, without first securing authorization from the Commission. Any such acquisition or control without prior authorization shall be void and of no effect.

1987 V.I. Acts 5258 § 1(a) (to be codified at V.I. CODE ANN. tit. 30, § 43a, App. p. 50.

The PSC scheduled a final hearing on the matter, but before the hearing could be held, ATN filed this suit in the District Court of the Virgin Islands on June 2, 1987, challenging the jurisdiction of the PSC to review or impose any conditions on the sale. ATN sought both declaratory and injunctive relief against interference by the PSC with ATN's purchase of Vitelco's stock. The district court promptly granted ATN's summary judgment motion and entered a judgment of permanent injunction prohibiting the PSC from reviewing the sale or imposing any conditions upon it. Within a few days after the district court announced its decision orally, ATN and ITT proceeded to

close the sale of stock without PSC approval. Thereafter, while the appeal was pending and without notice to the PSC, ATN negotiated a loan package of $104 million. ATN caused Vitelco to directly borrow $60 million, secured by mortgages on all its real property and UCC liens on all its personal property. (Affidavit of Cornelius Prior filed with the Court of Appeals). ATN thereupon directed the utility to declare a dividend in favor of ATN for virtually the entire $60 million, which in turn was used to retire the short term acquisition loan from E.F. Hutton, one of the original principals of ATN. Further, Vitelco was caused by ATN to guarantee an additional $44.4 million loan to ATN as part of the refinancing. All of the refinancing of the purchase was effected while the appeal was pending, after briefing and oral argument, but before the decision of the court of appeals was issued.

On appeal, the Third Circuit unanimously found the PSC did have jurisdiction under the broadly worded original statute. While the PSC did not have direct jurisdiction over ITT or ATN, *per se*, the court of appeals concluded it did have authority to regulate what the purchaser could "extract from or impose upon Vitelco". The decision of the district court was accordingly reversed. A petition for rehearing was denied.

The mandate issued on July 25, 1988, and the matter was remanded to the district court, which has now vacated its injunction and is conducting proceedings in conformity with the appellate decision.[3]

———o———

[3]No motion to stay the mandate under FRAP 41 was filed.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Matter Is Not Moot. The Court of Appeals heard and rejected the argument advanced by ATN that the case was moot due to the closing held on the sale of stock. The Court of Appeals was also informed, by Motion to Supplement the Record and Affidavit, of the substantial refinancing which was effected by ATN after that closing.

In rejecting the mootness claim the court relied upon its opinions in *Jersey Cent. Power & Light Co. v. Township of Lacey,* 772 F.2d 1103 (3d Cir. 1985), cert. denied 475 U.S. 1013 (1986), and *Natural Resources Defense Council, Inc. v. U.S. EPA,* 683 F.2d 752 (3d Cir. 1982). It said:

> In this case, the court can afford meaningful relief by reversing because the PSC would then have the authority to impose fines for a violation of its order and perhaps to seek rescission of the contract. *See* 30 V.I.C. § 39 (1976). Although the PSC could choose not to seek these remedies, its right to consider them in subsequent proceedings makes this controversy a live one.
>
> This case is controlled by this court's decision in *Jersey Central Power & Light.* In that case, a utility company brought suit to declare unconstitutional a town's ordinance prohibiting the importation of nuclear waste into the town for the purpose of storage there. The District Court declared the ordinance unconstitutional and enjoined its enforcement, and the town appealed. While the appeal was pending, the utility company placed nuclear waste in a storage facility in the town. The Court of Appeals held that the case was not moot on two separate grounds. First, the court noted that the District Court's injunction

> allowed storage as well as importation. The court then reasoned that, because the storage continued, if the court reversed the town could get an injunction requiring the removal of the nuclear waste. Second, the court noted that the town could impose fines on the utility company under the ordinance if the court reversed. *Jersey Central Power & Light* supports the PSC's position since, like the town in that case, the PSC could seek to impose fines or to rescind the sale if the judgment of the District Court is reversed.

App. p. 6, n.2.

While the Court of Appeals did not mention *Edgar v. Mite Corp.*, 457 U.S. 624 (1982), that decision would not suggest a contrary result. That matter involved a tender offer made after entry of a preliminary injunction, later made permanent, prohibiting enforcement of a state statute intended to regulate corporate takeovers. There the plaintiff proceeded with the tender offer without complying with the state act after the injunction was issued. It was argued on appeal that the case was moot, but the Court held it was not inasmuch as state officials had stated they would prosecute the offeror if the lower court's decision were reversed. Obviously, *Edgar v. Mite* supports the court of appeals' conclusion that the instant matter is not moot, for the same reasons found persuasive in *Edgar*.

As in *Edgar v. Mite*, the Petitioner's effort here to raise the issue that the lower court's erroneous injunction creates a complete bar to further proceedings is, at best, premature, 457 U.S. at 630, and for the reasons expressed there in the concurring opinion of Justice Stevens, wrong as a matter of law. One purpose of seeking a declaratory judgment is, of course, to test the legality of state law before engaging in prohibited conduct.

> Recognition of this fact, however, does not determine the point at which an individual may act with absolute assurance that he may not be punished for his contemplated activity. The fact that a federal judge has entered a declaration that the law is invalid does not provide that assurance; every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be revised on appeal. 457 U.S. at 651.

II. The Virgin Islands Statutes Were Not Misconstrued By The Court of Appeals. Interpretation of the Virgin Islands' statutory framework for public utility regulation was carefully undertaken by the Court of Appeals.[4] Certainly this decision does not conflict with any decision of another court of appeals—none of which have jurisdiction over the Virgin Islands—or with any decision of this Court.

The suggestion that the opinion runs afoul of *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986) was made to the Court of Appeals and properly rejected. That decision, interpreting the Bank Holding Company Act, concluded the Federal Reserve could not broaden its own jurisdiction to include as "bankers" all entities making commercial loans

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[4]Petitioner alleges that counsel for the PSC made "misleading" arguments to the Court of Appeals, claiming that these arguments concerned "facts" and since ATN did not consider facts "relevant", it "ignored" the misinformation. Petition p. 9, p. 13 n.9. Passing the fact that the allegedly misleading information consisted of direct quotes from transcripts of PSC hearings, most attorneys who have practiced before the Court of Appeals for the Third Circuit would agree that court is fully able to consider both facts and law in the same case. It may also be noted that counsel representing ATN before the court of appeals, Covington & Burling, has not authored this Petition.

simply by implementing regulations or adopting definitions of an inclusive nature, when the very entities involved had been exempted from FRS jurisdiction by *explicit* terms in the congressional act. Here, however, the territorial statutes are generally and broadly written to confer on the PSC the power to insure that the public utilities serving the Virgin Islands furnish "servic and facilities reasonably safe and adequate and in all respects just and reasonable." V.I. CODE ANN. tit. 30, § 2.

In the words of the court of appeals, this broad power coupled with an expansive statutory directive that the Commission's power and authority are to be liberally construed, and deemed to include "all additional, implied, and incidental power which may be proper and necessary to effect and carry out . . ." its mandate, V.I. CODE ANN. tit. 30, § 41, requires the conclusion that

> In order to fulfill this responsibility, the PSC must have the authority to require a utility to maintain the kind of financial stability that will enable it to continue providing adequate facilities and service at reasonable rates in the future. In particular, if a sale of a utility's stock is proposed on terms that the PSC concludes will deprive the utility of such financial stability, it must be able to act effectively or its statutory mandate will go unfulfilled.

App. p. 8.

There is in this statutory scheme no express exclusion—as there was in *Dimension Financial Corp.*—of the jurisdiction exercised. There is, however, ample confirmation of the legislative intent that the PSC's jurisdiction should be broadly construed, including the matter of sale of stock of this utility, which was confirmed in the very franchise of Vitelco, App. p. 3, as the original legislation required.

Moreover, ATN misunderstands the nature of the Court of Appeals' decision. See Petition, p. 5. ATN focuses on the PSC's order No. 22/1987, entered on April 23, 1987, as "the subject matter of this controversy" rather than on the fundamental issue—whether the PSC had the right to review and regulate a sale of stock of the telephone company *at all.* When the district court entered the injunction it did not do so upon a finding that the PSC's order was unreasonable or unduly burdensome. It did so stating its view that the statutes left the PSC no power whatsoever to "grant or withhold its approval to a sale of a public utility. Therefore, it could not lawfully impose conditions on such a sale." App. p. 23. In this, the court of appeals unanimously reached a contrary conclusion, finding ample authority in the statutes for such review. Accordingly, the importance of the acknowledgements the PSC's hearings drew from ATN's counsel in February, 1987, concerning adverse consequences of the financing upon Vitelco as then proposed, were highly relevant to confirm that the process of PSC review of the sale served an important public purpose—an issue raised by the contract clause claim which ATN, itself, had presented in its complaint. In fact, the PSC order ATN now emphasizes was not even final when this action interrupted administrative proceedings, App. p. 10, n.3, and neither the district court nor the Court of Appeals reached the issue of its specific terms.

The decision of the Court of Appeals interpreting the Virgin Islands statute is neither inconsistent with the decision of another circuit, inconsistent with any decision of this Court, nor does it decide any question of federal law.

III. No Impermissible Restraint On Interstate Commerce Arises From This Statute. The Virgin Islands statutes, creating and granting jurisdiction to the Public Services Commission to regulate public utilities doing business in the Virgin Islands, including the sale of stock of such utilities, does not constitute an impermissible restraint on interstate commerce under the principles set forth in *Edgar v. Mite Corp.*[5]

Edgar v. Mite involved a conflict between a federal statute, carefully crafted to regulate corporate takeover attempts without undue preference for management or for the tenderor. The state of Illinois had adopted a statute on the same subject imposing substantial additional burdens on such attempts when an Illinois target company was involved. The federal law specified state jurisdiction in the field could continue "insofar as it [did] not conflict with the provisions of [the Williams Act]." 457 U.S. 630. The Court noted that any state statute which did conflict with the federal act was, of course, void. The issue posed was whether the Illinois law frustrated the objectives of the federal act "in some substantial way." 457 U.S. at 632. In resolving that issue the test was expressed in these words:

> A state statute must be upheld if it regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only

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[5]The Virgin Islands Public Services Commission exercises no jurisdiction over long distance telephone carriers, nor is Vitelco engaged in the supply of interstate telephone service. It is a local telephone company providing service to the U.S. Virgin Islands. Long distance telecommunications to and from the territory are supplied primarily by AT&T.

> incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative benefits. 457 U.S. at 640.

Here the Virgin Islands statutes regulate local public utilities—a field long held infected with a substantial public interest. Sale of the only utility providing telephone service in the U.S. Virgin Islands, to one not qualified by experience or financial resources to effectively operate the utility, could undermine the territory's economy and social well being, if the result were to be a failure of the utility to maintain its capability to render adequate service at reasonable rates. Surely, any effect on interstate commerce inherent in such review, is incidental at best. Indeed, absolutely no showing was made on the record below of any adverse effect on interstate commerce resulting from the PSC's regulatory review.

Neither is any federal statute identified—as it was in *Edgar v. Mite*—which the Virgin Islands law compromises or impairs. If anything, recent decisions of this Court have confirmed the propriety of active local participation by regulatory commissions in the area of telecommunications, notwithstanding the parallel role of the federal regulatory authority in the field of interstate communications. *Louisiana Public Services Comm. v. FCC,* 476 U.S. 355 (1986).

———o———

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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NO. 88-643

In The
Supreme Court of the United States
October Term, 1988

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands corporation,

Petitioner,

v.

THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS, PATRICK M. RICE, EXECUTIVE DIRECTOR OF THE PUBLIC SERVICES COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

STATEMENT OF FACTS 2

I. THE FACADE OF DUE PROCESS 3

NO. 88-643

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner, Atlantic Tele-Network Co., respectfully submits to the Court this Supplemental Brief setting forth a Public Services Commission Hearing held October 25, 1988, after the submission of the Petition for a Writ of Certiorari.

STATEMENT OF FACTS

Atlantic Tele-Network Co. ("ATN"), in the United States District Court of the Virgin Islands, moved the summary judgment asking the Court to find that the Public Services Commission ("PSC") Order 22-1987 was not valid since the PSC decision violated the Government in the Sunshine Act, 1 V.I.C. 251 et. seq. Then ATN moved the Court for a stay of PSC proceedings, in particular the PSC hearing scheduled for October 25, 1988, until all matters resolving the case are decided.

PSC Chief Counsel, Maria Tankenson Hodge ("Hodge"), Esq., argued October 24, 1988, that the PSC Order 22-1987 was not final.

District Court Judge O'Brien, citing footnote 3 to the Third Circuit's decision, decided the PSC Order 22-1987 was not final and PSC hearings could proceed.

On October 25, 1988, the PSC held a hearing which concluded that the sale of the Virgin Islands Telephone Corporation stock ("Vitelco Stock") from ITT Corporation ("ITT") to ATN is to be rescinded subject to an order to show cause to ITT and Rural Telephone Finance Corporation ("RTFC").

ATN objected to the hearing because the only notice ATN received merely noted the docket number and failed to notice ATN of what action was contemplated at such meeting. Further, ATN did not receive Mr. Madan's prefiled testimony until six days before the hearing.

Though there was no formal notice to ITT or Coral Communications, Inc. ("CCI") such parties attended the October 25, 1988 PSC hearing. Samuel Sugden, Esq.,

ATN's and Vitelco's attorney until approximately February 1988, attended as CCI's attorney. ATN had no advance notice that ITT or CCI would be in attendance at the PSC hearing.

I.

THE FACADE OF DUE PROCESS

Since the Third Circuit's decision the course of conduct of the PSC has not changed, but merely has become bolder. Except for a few comments, Petitioner feels the record set forth in the appendix speaks for itself.

In reviewing the appendix herein, Petitioner would like the Court to note:

(i) the October 25, 1988, PSC hearing was the first PSC hearing about the acquisition of Vitelco Stock since April 21, 1987;

(ii) the testimony fails to provide any concrete evidence establishing the required nexus between the acquisition, on one hand, and rates and services, on the other hand;

(iii) the record demonstrates that the PSC does not want to review performance during the sixteen months since closing because all evidence would demonstrate that its position during the previous hearings was unfounded;

(iv) the suggestion of bribery on page 43 of the transcript (App. 55-58) is without merit and is absolutely and unequivocally wrong and baseless;

(v) Mr. Sugden, on page 63 of the transcript, is aware of pre-filed testimony that was only made part of the record and not given at the hearing; and

(vi) Mr. Sugden, on page 64, acknowledges that a rate decrease is proper "because of the 1986 Tax Act." This decrease is at a maximum $300,000 far less than $4.2 million facing Vitelco if ATN retains ownership.

The PSC is clearly treating PSC Order 22-1987 as final because the violation of the Order serves as the only basis to invoke rescission. Without giving ATN a right to contest PSC Order 22-1987 or to contest or comply with any new order the PSC may issue, rescission has been ordered. The PSC looks favorably upon an offer to pay $11.6 million for ATN's stock and assume all debt even though the PSC contended ATN's acquisition price was too high and the debt levels were unacceptable.

PSC counsel, Maria Hodge, Esq., suggests in Respondents' brief in opposition that the Third Circuit's decision should be narrowly construed. In fact, as the attached proceedings illustrate, the Third Circuit decision is broadly construed by the PSC.

The Third Circuit's result oriented decision has been interpreted as a license granting the PSC broad authority to punish ATN for contesting the PSC's jurisdiction.

Respectfully Submitted,

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands corporation,
Petitioner

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TABLE OF CONTENTS FOR APPENDIX

Page

1. Jamshed K. Madan's Pre-Filed Testimony for Oct. 25, 1988 PSC Hearing ..... App. 1
2. Transcript of October 25, 1988 PSC Hearing ... App. 21
3. PSC Order 31-1988 Rescinding Sale Subject to Show Cause Order ..... App. 82
4. ATN's Audited Financial Statement as of December 31, 1987 ..... App. 88

EXHIBIT I

VIRGIN ISLANDS
PUBLIC SERVICES COMMISSION
DOCKET NO. 301

IN THE MATTER OF THE SALE OF
VIRGIN ISLANDS TELEPHONE CORPORATION
STOCK TO ATLANTIC TELE-NETWORK CO.

TESTIMONY OF STAFF WITNESS
JAMSHED K. MADAN

OCTOBER, 1988

VIRGIN ISLANDS TELEPHONE CORPORATION
DOCKET NO. 301
TESTIMONY OF JAMSHED K. MADAN

TABLE OF CONTENTS

		PAGE
I.	SCOPE AND PURPOSE OF TESTIMONY	1
II.	INTRODUCTION AND PROCEDURAL BACKGROUND	3
III.	IMPACT OF UPDATED INFORMATION AND ACTIONS TAKEN BY VITELCO AND ATN	8
IV.	ITEMS FOR PSC CONSIDERATION	14

I. SCOPE AND PURPOSE OF TESTIMONY

Q. Please state your name and address.

A. My name is Jamshed K. Madan, and my business address is 456 Main Street, Ridgefield, Connecticut 06877.

Q. Are you the same Jamshed K. Madan that testified previously in Docket 301 before the PSC?

A. Yes, I am.

Q. What is the scope and purpose of your testimony in this proceeding?

A. It is my understanding from Counsel that the PSC's investigation concerning the sale of VITELCO stock from ITT to ATN has been remanded to the Commission from the District Court based upon the decision reached by the Third Circuit Court of Appeals. Specifically, in an opinion filed on March 10, 1988, the Third Circuit Court of Appeals stated:

> "We hold that the PSC had authority under the pre-amendment statute to impose conditions on the sale of VITELCO's stock as a means of assuring VITELCO's continuing ability to provide adequate facilities and service at reasonable rates. In light of this holding, we need not decide whether the application of the statutory amendment to this sale would violate the contract clause. We will reverse the judgment of the District Court and remand for further proceedings consistent with this opinion."

This Commission has issued several orders with regard to conditions on the proposed sale of VITELCO stock to ATN. In the time following the issuance of the PSC's orders, VITELCO and ATN have undertaken various

transactions and commitments resulting in a changed financial and operating condition for VITELCO. The scope and purpose of my testimony in this proceeding is to provide for the Commission an analysis of the impact of updated information and actions taken by VITELCO and ATN as they reflect upon the conditions imposed by the PSC originally for the proposed sale of VITELCO stock to ATN and, based upon this analysis, to present items for the consideration of the PSC.

II. INTRODUCTION AND PROCEDURAL BACKGROUND

Q. Please provide a brief recap of the orders issued by the PSC relevant to the proposed sale of VITELCO stock to ATN?

A. There have been several orders and actions taken by the PSC with regard to the proposed sale of VITELCO stock to ATN. Specifically:

1. On January 13, 1987, the PSC issued Order No. 1-1987 requesting VITELCO to provide details of the proposed sale of VITELCO stock to ATN.

2. On February 5, 1987, the PSC issued Order No. 3-1987 indicating, amongst other things, that the proposed sale of VITELCO stock to ATN was not to be consummated under the proposed terms and conditions of the sale as described by ATN.

3. On February 25, 1987, the PSC issued Order No. 7-1987 whereby the Commission stated that provided certain changes in the proposed terms of the purchase were implemented, the PSC would con-

sider its original Order prohibiting the sale of VITELCO stock to ATN to be vacated. Order 7-1987 spelled out in detail the changes required in the proposed financing that was to be pursued by ATN to consummate the purchase of VITELCO stock.

4. On April 23, 1987, the PSC issued Order No. 22-1987. In this Order, the PSC recognized that the individuals originally identified as being owners of ATN had changed and that new owners of ATN were committed to pursuing the purchase of VITELCO stock from ITT. The new ownership of ATN was identified as Jeffrey Prosser (27.5%), Cornelius Pryor (27.5%), and E. F. Hutton (45%). In this Order, the PSC included several ordering clauses that were intended to protect VITELCO assets and VITELCO from certain conditions that the PSC determined would not be in the best interest of providing safe and adequate service. Specifically, the PSC Order prohibited any negative pledge on the assets of VITELCO, indicated that the proposed purchasers could not impose a dividend policy that would be adverse to VITELCO, indicated that the proposed sale could not be consummated with the use of a holding company, and required certain guarantees such as the submission of a irrevocable letter of credit, or fully equivalent guarantee on the part of E. F. Hutton in the sum of $15 million.

Subsequent to the PSC's issuance of Order No. 22-1987, on April 23, 1987, VITELCO and ATN sought relief

from the District Court with regard to the Commission's actions on conditions surrounding the proposed sale of VITELCO stock to ATN. On July 7, 1987, the District Court issued an Order in indicating that the PSC, prior to May 19, 1987, was not empowered to grant or withhold approval of the sale of stock of VITELCO to ATN, nor could it impose any conditions on such a sale. In addition, the District Court stated that Act No. 5258 of the Legislature of the Virgin Islands constituted a substantial and unjustified impairment of ATN's legitimate rights and expectations and could not be constitutionally applied to the purchase of VITELCO stock.

Finally, as indicated in the prior section of my testimony, in an Opinion filed on March 10, 1988, the Third Circuit Court of Appeals reversed the Decision of the District Court with regard to the PSC's powers surrounding the sale of VITELCO stock to ATN.

Q. Do you have any observations with regard to developments subsequent to PSC Order No. 22-1987?

A. Since the time that VITELCO received its initial Order from the District Court, it consummated, in its view, the proposed acquisition of VITELCO stock from ATN. In consummating the purchase, VITELCO has clearly violated almost every condition set down by the PSC in its Order No. 22-1987 because VITELCO believed that the PSC Order was not valid. However, even after ATN and VITELCO had received an adverse decision from the Third Circuit Court of Appeals, they continued to pursue policies contrary to the PSC's rulings by forming subsidiaries, paying dividends, etc.

In addition to violating almost every condition which was described in Order No. 22-1987, several additional facts became available with the passage of time, such as the consummation of certain financing by VITELCO and ATN to pay for the purchase of VITELCO stock from ITT. Certainly, since this financing was not underway at the time the Commission undertook its Order No. 22-1987, the Commission had no way of addressing the conditions set forth in the financing documents.

Therefore, I believe it is important for the Commission to understand that, in reviewing the situation, not only are the original facts before the PSC for reconsideration, but, in addition, the details of the financing that were described in great detail in the rate proceeding should also be discussed. As I discussed in Dockets 314 and 316, the restrictions that have been placed upon VITELCO through the financing that has taken place are onerous and not in the best interests of VITELCO in providing safe and adequate service to its ratepayers.

As a result of the hearings in Docket 316, the PSC, on October 11, 1988, issued Order No. 28-1988, where it stated and ordered that VITELCO not transfer, convey, sell, assign, lend or encumber to ATN, VITELCOM, or any person or entity owned by or affiliated with ATN or VITELCOM, any assets of VITELCO without the prior approval of the PSC. The PSC further ordered that VITELCO be restrained and enjoined from declaring and/or paying any dividends or advisory fees to Atlantic or anyone affiliated with Atlantic. Finally, the PSC ordered that VITELCO an ATN notify the PSC in advance in the event of a proposed sale of any material interest in ATN or VITELCO and to provide details of any such transaction to the PSC in advance of its consummation.

III. IMPACT OF UPDATED INFORMATION AND ACTIONS TAKEN BY VITELCO AND ATN

Q. In the prior section you stated that after receiving the decision of the district court, VITELCO took certain actions which violated the conditions set forth in Commission Order No. 22-1987. Would you please summarize the actions taken by VITELCO?

A. In summary, VITELCO consummated the alleged purchase of VITELCO stock form ATN and, the following describes areas where the PSC's conditions in Order No. 22-1987 were violated:

1. The sale of VITELCO did take place using the holding company structure. ATN, which is a holding company, became the purchaser of VITELCO stock in direct contradiction to the PSC Order No. 22-1987 and VITELCO became a wholly owned subsidiary of ATN.

2. The alleged purchase of VITELCO stock was consummated without an irrevocable letter of credit, or fully equivalent financial guarantee on the part of E. F. Hutton in the sum of $15 million which was required by the Order.

3. The purchase price of VITELCO stock, as well as fees payable to various related parties for advisory fees, bridge financing, commitment fees, and other associated financing fees were financed by debt upon instructions of ATN in contradiction to the Commission's Order No. 22-1987.

4. Prior commitments and representations made by prior officers, principals, and attorneys of ATN

were not considered binding and were abandoned by ATN and VITELCO. Specifically, VITELCO stated in various rate proceedings that it did not believe any commitments made with regard to employment to be binding upon VITELCO and/or ATN.

5. VITELCO and/or ATN entered into various employment contracts with the principle shareholders of ATN which were not considered to be arms-length and certainly were not the subject of review by the PSC as required in Order No. 22-1987.

Q. In the prior section you also indicated that VITELCO had undertaken new financing which had imposed conditions on VITELCO and/or ATN which were not in the best interests of VITELCO in providing safe and adequate service. Could you please explain?

A. This item has been the subject of my testimony in Docket 316, and my testimony on Pages 69-79 in that proceeding explained these items in detail. However, to summarize:

1. ATN has unconditionally obligated VITELCO to be responsible for $60 million of debt borrowed directly by VITELCO and then remitted, almost in total to ATN as a dividend, and as guarantor for an additional $44.4 million of debt that has been assumed by ATN.

2. For purposes of the loan agreement, VITELCO and ATN are to be viewed as a single entity. Specifically, in Section 1.08, the loan agreement states that from the point of view of the lender,

the debt service coverage for VITELCO and ATN will be calculated on a consolidated basis for ATN and subsidiaries taken as a whole. This means that the additional debt taken on for ATN, as well as any future additional debt that may be taken on from unregulated and unconnected subsidiaries, would impact on VITELCO both now and in the future. Since ATN at the present time has no revenue other than from VITELCO's present and prior telephone operations, its additional debt reduces the combined VITELCO/ATN coverage and could cause VITELCO to be in a default position.

3. Section 5.03 of the loan agreement indicates that VITELCO is to purchase certain subordinated capital certificates (SCC) in the amount of $10.4 million as a requirement of obtaining the consummated financing. In other words, approximately $10 million of the financing was ascribed entirely to VITELCO to act as a sort of compensating balance to the lender while ATN had no such requirement made of it.

4. Section 6.05 of the loan agreement indicates that the debt service requirement as well as the times interest earned ratio (TIER) is to be considered from a consolidated point of view for ATN and VITELCO taken as a whole. In this section, again, the results of the regulated utility will be impacted by the additional borrowing that has been taken on by ATN and the potential additional borrowing by ATN and other subsidiaries in the future.

5. Section 7.06 of the loan agreement indicates that VITELCO may not take on additional indebtedness other than in a restricted set of circumstances. Here again, ATN has reduced the financial flexibility of VITELCO. It is important for this Commission to bear in mind that prior to the proposed acquisition of VITELCO stock by ATN, VITELCO was debt free and, therefore, possessed great financial flexibility to face the future. By the alleged purchase of VITELCO stock by ATN, all the borrowing capacity of VITELCO has been used to permit VITELCO's new owners to finance its acquisition without making any personal guarantees to finance the transaction and without any compensation or consideration to VITELCO.

6. Section 9.01 of the loan agreement deals with the rights and remedies of the lender of financing to ATN and VITELCO. This section indicates that if there is a particular problem with ATN, that is not related to the operations of VITELCO, VITELCO will also be dragged into a financial default arising out of ATN. This clearly has negative connotations for VITELCO.

7. Section 3.15 of the mortgage and security agreement indicates that any change in the chief operating officer of chief executive officer of VITELCO or ATN must be approved by the lending financial institution. As indicated in my prior testimony, this is an inappropriate condition to be imposed on VITELCO.

Q. What conclusion do you draw from the above?

A. The conclusion I draw is that conditions have changed sufficiently from the time the Commission issued its prior decision in Order No. 22-1987 because the facts surrounding VITELCO and ATN have changed. These changed circumstances must be taken into consideration by this Commission in determining what course of action is appropriate in the future. At a minimum, the terms of the acquisition are both in violation of Order No. 22-1987 and more detrimental to VITELCO than the original terms proposed to the Commission.

IV. ITEMS FOR PSC CONSIDERATION

Q. Given the action taken by VITELCO and ATN at this point, could you please indicate what issues should be brought to the PSC's attention with regard to potential conditions on the sale of VITELCO stock to ATN?

A. There are several items that need to be brought to the PSC's attention. I will deal with several of these items below.

1. *Conditions Imposed by Financing and the Amount of Loan*

The overall amount of borrowing against which VITELCO stock has been pledged remains one of the principal problems with this transaction. As described in my testimony in Docket 316, the unconditional pledge of VITELCO to guarantee $44.4 million of borrowing made solely on behalf of ATN is inappropriate. Therefore, if the PSC were to decide that VITELCO stock should not guarantee any more than VITELCO's operations, then the unconditional pledge of VITELCO to guarantee $44.4 million of debt taken on behalf of ATN should be removed.

All further references in the financing agreement to treating ATN and VIITELCO on a consolidated basis with regard to earnings coverage tests as well as times interest earned ratio tests should also be removed and the financing of VITELCO for its public utility operations should in all manner be divorced from any operations of ATN or any potential future subsidiaries.

The requirement of VITELCO to invest in subordinated capital certificates (SCC) should be made in proportion to the overall debt of VITELCO to the total borrowing. In other words, VITELCO should only be required to invest approximately $6 million in SCCs.

The requirement that the lending institution have a final determination on the next chief operating or executive officer of VITELCO should be removed.

The inability of VITELCO to assume additional debt other than in very restricted conditions should also be removed.

Even with the implementation of all the conditions above, VITELCO will still be almost 100% debt financed. VITELCO must realize that this high leverage will be reflected in the setting of its rates.

It has now been almost 16 months since the alleged purchase of VITELCO. The PSC should mandate a reasonable capital structure. I would recommend a minimum lead of equity of 15% of the capital structure by 1988 and 25% by 1989.

2. *Holding Company Structure*

In my opinion, the Commission's original objection to the use of a holding company structure, as contained in Order No. 22-1987, should continue. In the prior order, the Commission stated that no such sale of VITELCO stock shall provide for the use of a holding company structure except in conjunction with an express prohibition upon the holding company's participation in any venture other than ownership and operation of VITELCO.

The issue of the holding company has been problematical in many respects. First, the Company, under the guise of the holding company, has refused to provide information which would have been relevant to the litigation of the rate proceeding. In addition, financial transactions become much more complicated to be monitored and also provide for the Company to enter into deregulated lines of business which could adversely affect the ability of VITELCO to raise capital in the future, by consuming the value of VITELCO's assets as collateral as well as its earnings as a measure of ability to repay debt.

Finally, it is my understanding from Counsel that if additional lines of business are deemed desirable by VITELCO rather than ATN, separate subsidiaries of VITELCO should be formed which would enable the Commission to directly have access to all information and thereby avoid the problem created by having subsidiaries of ATN.

3. *Intercompany Contracts*

The PSC's Order No. 22-1987 dealt with the issue of intercompany contracts and indicated that any proposed

intercompany contract should be executed at arms-length and be subject to close scrutiny by the PSC. I do not believe it is necessary to repeat here the extended testimony in the rate proceeding with regard to the issue of intercompany contracts. Suffice it to say that this Commission decided that the current contract was not executed at arms-length (the contract was signed by Mr. Prosser for both ATN and VITELCO), and in addition, no scrutiny was requested of the PSC. Given ATN's limited experience in telecommunications, the PSC might want to consider a prohibition against such contracts between VITELCO and ATN and to require that VITELCO's telecommunications advisory, when such advice is necessary, be undertaken in the most efficient and economical manner from a party unrelated to ATN possessing the necessary expertise.

4. *Management of VITELCO*

Subsequent to the alleged purchase of VITELCO stock by ATN, the new owners undertook to remove Mr. Basford as president of VITELCO and promptly installed Mr. Pryor as the Chairman of the Board and Mr. Prosser as President of VITELCO. The PSC's decision in the recently concluded rate proceedings indicated that the salaries related to Mr. Pryor and Prosser were not to be permitted as a valid ratemaking expense and that a reasonable amount for an executive based upon the salary of Mr. Basford prior to the alleged consummation of sale be taken into account in setting rates. If the PSC is not convinced with regard to the capability of Mr. Pryor and Mr. Prosser in managing operating telephone company, then a condition with regard to the sale could require that VITELCO directly hire competent top management to run the telephone

company and that Mr. Pryor and Mr. Prosser remain as investors in this operation. I would point out that representations of ATN officials that no lay-offs would be made for a period of three years did not appear to be treated as binding in the case of the employment of Mr. Basford as president of the telephone company.

5. *ATN Representations Made to the Commission*

The language contained in the Commission's original order still appears appropriate. This language was:

> "Any and all representations to this Commission, made by officers, principals or attorneys of ATN, at any time, shall be and hereby are deemed binding upon ATN, notwithstanding changes in ownership subsequent to such representations."

I believe this language speaks for itself, and this item should be given due reconsideration by the PSC.

6. *Other Costs Associated With the Transaction*

Information received from VITELCO in the course of the rate proceeding indicates that one of the costs of the transaction of the proposed sale of VITELCO stock to ATN has resulted in an additional insurance premium that ATN wishes to charge the Virgin Island ratepayers for in the amount of $1 million. Such an increase in cost to the local ratepayers is significant. The PSC has held open the item of the additional insurance costs for future investigation and determination, but in Dockets 314 and 316, did not make a specific adjustment to disallow these costs in the ratemaking process. In the current situation, where the PSC is investigating the appropriateness of the alleged sale of VITELCO stock to ATN, it should also take into

consideration whether a proposed sale should be consummated given evidence that the sale would result in a direct increase in operating costs of $1 million which the buyer of the stock wishes to pass on automatically to the telephone subscribers of the Virgin Islands. The PSC could certainly take the position that any direct costs arising out of the proposed transaction be paid for by the stockholder rather than the ratepayers of the Virgin Islands.

7. *Purchase of Additional Shares*

Mr. Pryor and Mr. Prosser have made it known that they have negotiated an option to buy out the 45% ownership of Shearson Lehman. This buy-out contradicts testimony given to the PSC that originally E.F. Hutton and then Shearson were in "for the long haul." The financial resources of Shearson were given as major evidence for financial stability of the proposed purchase. Similarly, its experience in and access to expertise in telecommunications were emphasized. Without Shearson, it is not clear what financial resources back the transaction or what access to expertise is provided. As such, the PSC might want to consider the wisdom of releasing the major investor that was presented as having the capability of providing financial resources and services as well as the wisdom of permitting Messrs. Pryor and Prosser from exercising the option to acquire the remaining 45% of VITELCO for themselves.

Q. Are there any other issues which you wish to bring to the attention of this Commission?

A. Yes, there are. During the course of hearings related to proposed legislation for "rate stability",

VITELCO made it clear that it was prepared to undertake certain programs in conjunction with "rate stabilization" which it appeared not to be willing to do with regard to its normal operations. Specifically, VITELCO offered to implement a "911" emergency system and a lifeline plan in the context of a rate stabilization plan.

The implementation of an enhanced "911" plan is of the utmost importance to the people of the Virgin Islands. A delay in the implementation of such a system could have the potential of costing lives while VITELCO is arguing about the appropriate mechanism for a rate structure. In my opinion, given that the technology exists for the implementation of an enhanced "911" system, such a system should be deployed without a delay and not held hostage to the intents of the current alleged owners of VITELCO stock. These actions depict the trade-offs that the current owners are willing to make with regard to operating conditions of the telephone company which would bear analysis upon the Commission's decision to determine whether they ought to be afforded the opportunity to own the telephone company.

Similarly, with a lifeline plan, the elderly, indigent, and handicapped in the Virgin Islands would be afforded low cost telephone service. Such programs have been implemented with great frequency in the United States. A docket with regard to a lifeline program has been opened by this Commission for a considerable amount of time, but the alleged new owners of VITELCO have sought to make implementation of this program conditional upon legislative adoption of their desired rate guarantee law. Here again, the delay in implementation of these plans greatly

increase the suffering of a targeted segment of the population which has every right to receive such relief. Again, holding these people hostage to further the personal aims of the current owners of VITELCO is inappropriate.

In the end analysis, the Commission must decide whether the proponent of the request for approval of consummation of the alleged sale of VITELCO stock to ATN is responsible and capable of running and maintaining an operating telephone company with its high technology. The PSC has dealt with the owners of ATN directly in the course of the recent rate proceedings, has observed their actions in regard to financing and involving VITELCO while the injunction was in place, has encountered the apparent lack of experience with regulatory procedures exhibited by ATN officials—now functioning also as VITELCO officials—and now must make its own analysis with regard to whether it is consistent with the continued financial and operational viability of VITELCO to permit the ownership of the telephone company to be transferred to ATN. As mentioned previously, Mr. Pryor and Mr. Prosser have obtained an option to buy out the interest of Shearson Lehman in VITELCO. When these individuals originally came before the Commission, the financial strength of E.F. Hutton originally and Shearson Lehman subsequently was presented as a significant reason as to why the financial stability of VITELCO would continue into the future. At this time, Mr. Pryor and Mr. Prosser have shown no personal substantial net worth to provide confidence that on their resources alone the financial condition of VITELCO would be safe. The "long-term commitment" of E.F. Hutton and Shearson Lehman appear to

be in doubt. The terms of the financing implemented were highly advantageous to ATN but have no apparent attention to the welfare of the utility. Under these circumstances, the risks to this major public utility's health and strength associated with this proposed sale must be considered—at best—substantial.

Q. Mr. Madan, does this conclude your testimony?

A. Yes, it does.

EXHIBIT II

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNITED STATES

PUBLIC SERVICES COMMISSION

RECEIVED NOVEMBER 1, 1988
J. J. PROSSER, PRESIDENT

HEARING IN RE
PSC DOCKET NO. 301

TUESDAY, OCTOBER 25, 1988
10:15 A.M. to 12:22 P.M.

MEMBERS PRESENT

GEORGE C. PARROT, CHAIRMAN
ALFRED B. HAYES, VICE CHAIRMAN
ALPHONSE ADAMS, COMMISSIONER
HECTOR L. RIVERA, COMMISSIONER
MADALINE SEWER, COMMISSIONER

STAFF PRESENT

PATRICK RICE, EXECUTIVE DIRECTOR
MARIA TANKENSON HODGE, LEGAL COUNSEL
JAMSHED K. MADAN, CONSULTANT

FOR VITELCO

ALBERT SHEEN, ESQ.

THEODORE A. DORSETT & ASSOCIATES
REGISTERED PROFESSIONAL
COURT REPORTERS
P.O. BOX 5528
ST. THOMAS, VIRGIN ISLANDS 00801

(p. 2) INDEX

ITEM	DESCRIPTION	PAGE
1.	Presentation by Counsel to Commission	3
2.	Testimony by Mr. Madan	22
3.	Statement by Mr. Derrick Samuelson	55
4.	Statement by Mr. Samuel Sugden	57
5.	Adjournment	75

(p. 3) The Chairman: Good morning, ladies and gentlemen, I'll like to reconvene the hearing in Docket 301 this morning.

Mrs. Hodge, will you run us up to date on any aspects of this.

Mrs. Hodge: Yes, Mr. Chairman. The proceeding in the District Court in Civil Number 1987/257 continued as of yesterday afternoon. At that time the District Court heard a motion filed by Atlantic Tele-Network Company for a contemporary restraining order and a preliminary injunction to prohibit the Commission from going forward with its hearing today either upon the grounds that ATN had filed a petition for certiorari to the Supreme Court which the District Court shall allow to be acted upon before the Commission went forward with its proceedings or in the alternative on the grounds that there was a legal deficiency which entitled ATN to prevail relating to the contention that when order Number 22-1987 was entered last year that there was a violation of the Sunshine Act.

The District Court Judge heard argument yesterday afternoon in St. Croix and declined to enter any injunction prohibiting you from going forward today. So at the present time, it is legal and proper for the Commission to continue with its hearing in 301 today.

(p. 4) I have just a few moments ago been served or been handed a copy of a motion for postponement of the hearing, apparently filed by VITELCO with the Commission yesterday. Although the certificate of service reflects that it was served on Friday of last week. To the best of my knowledge, that is not correct. It was not

served on me in any case, and Mr. Rice indicates the Commission did not get its copy until yesterday. It will be proper for the Commission to hear from the attorney for—are you representing both VITELCO and ATN today?

Mr. Sheen: Yes, ma'am.

Mrs. Hodge: Okay. The attorney for VITELCO and ATN in support of its motion for postponement before you proceed, and now will be appropriate time. I have only copy of this, which I can hand up to Chair.

The Chairman: All right.

Mr. Sheen: Mr. Chairman, may I be heard? We filed yesterday with the Commission and with counsel for the Commission a request for a continuance of today's hearing on the grounds that we would like a longer period of time to prepare for a presentation. We don't believe that we had received proper notice of this hearing.

I would like and I respectfully request that the (p. 5) written motion be made a part of this record, and if the hearing is not continued, I'll alternatively request that no decision be taken by the Commission until VITELCO has had an opportunity, VITELCO and ATN, has had an opportunity to address the Commission and respond to any testimony taken today.

The Chairman: Counsel.

Mrs. Hodge: Mr. Chairman, the contents of the motion for continuance in addition to setting forth the positions that were presented to the District Court yesterday takes the position that the notice to the paries represened by Mr. Sheen of your hearing today was not suf-

ficient to give them a reasonable opportunity to prepare. It also takes the position that because the injunction entered by the District Court last year has not been officially vacated by an order of the District Court, that it would be improper for you to go forward. As to the adequacy of the notice, under the provisions of Title 30, section 22, a utility is entitled to ten days notice of a hearing. That notice, I believe, and we may want to check the record to confirm my understanding of this, was served on VITELCO more than ten days prior to today. That is Order Number 29-1988. In as much as the officials of VITELCO and ATN are for the most part the same, I think it will (p. 6) be fair to assume that ATN had notice the same day.

I do not believe that the provisions of Section 22 require you to set forth in text the details of the subject you will take up. Reasonable notice requires that the parties have some idea what you are going to consider, and what they ought to be prepared to address, and the notice did state that it was the intention of the Commission to bring in this matter on for further hearings. PSC Docket Number 301 is one in which the nature of the Commission's investigation has been well known for over a year, and the subject of whether or not the Commission can approve the sale of stock of VITELCO from ITT to ATN, and if so, under what conditions, I think is well established to be the subject of that docket.

In addition, Mr. Madan's testimony was pre-filed last week, so that the utility and ATN had a detailed idea of what Mr. Madan's testimony will be today.

It is my view, therefore, that the notice to the utility and ATN is adequate to go forward today.

I would, however, not anticipate that the Commission would necessarily enter a final order today. It will probably depend on how comfortable you are with the evidence that you hear, and whether you feel there's more matters you want to explore before making a final (p. 7) decision. In particular, since one of the issues before you under the Third Circuit's decision is the possibility of a rescission of this sale, it has been by view that if you determine that that was one of the possibilities that you wanted to keep open after having heard the testimony today, that you probably would want to put ITT on formal notice to come forward and make any showing it felt proper in relation to that remedy. And it also may be proper to give formal notice to the lender, if rescission is one of the options that the Commission is inclined to consider.

So, I wouldn't anticipate that you will necessarily reach a final decision. On the other hand, if Mr. Sheen remarks to the Commission are intended to say that VITELCO and ATN do not consider themselves called upon to provide their position to you today, both in terms of testimony and argument about the details of what their transaction actually included, how they would see them as being consistent with the interest of the utility consumer, I would think that would not be a fair position to take. I think both ATN and VITELCO are on notice to be prepared to make that showing to you today.

So, on the basis of the motion, my advice would be you're not obliged to grant the continuance request, although it is within the Commission discretion to do so.

(p. 8) Mr. Hayes: I'll like to comment, but a question to counsel, too. Wouldn't it be true that if we were to accede to this motion and agree that they didn't have enough information, that it would be a precedent that would prevent anything new coming up at the hearing that hadn't been told to them before. I mean, in other words, it will be a straight jacket that we will be putting the hearing into.

Ms. Hodge: That will probably depend on the basis on which you acted on the motion. If the Commission determined that it will grant the continuance because VITELCO and ATN claimed they didn't have enough notice about what the hearing was about, they might very well set that precedent. If you decided to grant the continuance simply as a courtesy, which you will have the discretion to do, you can do that without setting a precedent.

On the other hand, I would point out to the Commission that the Commission's consultant has not only prepared prefiled testimony, but made the trip to the Virgin Islands to testify today, and the timing of the motion for adjournment is certainly not to be favored while the certificate of service recites it was filed and served on Friday. As I have indicated, the Commission's office didn't receive it until yesterday, the day before (p. 9) the hearing, the day when, of course, Mr. Madan would have had to be travelling, as well as the others who are here today, and I up to and including the today have only seen it handed to me this morning. It has not been served at my office. So, if a continuance was wanted, simply as a courtesy, one might have thought that the motion would

have been filed earlier since the notice of the hearing was served October 13th by hand on VITELCO and there's a substantial period of time thereafter that a motion setting forth these grounds could have been presented.

In any case, it is within the Commission's discretion to grant the continuance or not as it sees fit. I think legally you're entitled to proceed if you choose to do so. And Mr. Madan is available for cross-examination this morning.

Mr. Hayes: We have incurred expenses for this hearing that they appear to be unwilling to contribute to in any way. It is seems to me incredible that they will try to dump onto us some more unnecessary expenses and still try to keep money away from us.

The Chairman: That's my contention also, that we have been put out so many times, and what more information do we need in 301 than what we (p. 10) already have in all of these papers here.

Mr. Hayes: And the other thing is that their rules are— you will remember we asked them early on for a ten day— waiver of a ten day period and they wouldn't consider it. And for no reason except that they wouldn't consider it.

We have got many reasons for turning ths down. And the only reason for accepting it would be, it seems to me, would be a courtesy to them. And I think that that is entirely outside the—outside the necessary or proper action at this time.

The Chairman: Mr. Adams.

Mr. Adams: I just got this and I was reading it. And I note that the scheduled hearings are improper and premature. I think the premature part of it was just really addressed in as far as the timing of the court is concerned; I can't consider it premature. I don't know what the arguments on the impropriety of it are, because it seems to me that we have been and we still are in accordance with law and the order of the Third Circuit Court. So I'll like to know on what grounds they consider the hearings improper.

The Chairman: You want to address that to Mr. Sheen.

Mr. Sheen: Mr. Adams, (p. 11) I'll like to stand on the petition as it has been written. I'll like to have the Commission's permission to have that written statement made a part of the record.

Do I have your permission, Mr. Chairman, to supply to the Court Reporter a copy of the written request for a postponement.

The Chairman: Mrs. Hodge.

Mrs. Hodge: Mr. Adams, if I may briefly address you. As I understand the position in the motion concerning the impropriety the basic contention is that the District Court having entered an injunction prohibiting the Commission from going forward with the impostion of conditions on the sale of stock. Even though the Third though the Third Circuit has reversed that judgment and remanded the matter for further proceedings consistent with its opinion, that strictly speaking the District Court has not entered an order vacating its own injunction which

the Circuit has held erroneous. And the contention perceives that since ATN has filed a petition for certiorari to the Supreme Court essentially it would be inappropriate, unbecoming for the Commission to go forward now when the District Court's injunction has not been vacated by a separate order of the District Court.

However, what I think is disturbing about that is as you will remember since you were in court last week when (p. 12) the Commisison brought on a motion for preliminary inunction to restrain VITELCO and Atlantic Tele-Network from conveying away assets until the matter returned to you for further proceeding, the District Court Judge inquired at that time of Paul Berman of Covington & Burling who appeared on behalf of ATN whether they will stand on the formality that the District Court had not entered an order vacating its own injunction and contend that the Commission could not go forward until such an order was entered and at that time Mr. Berman stated to the Judge of the District Court that they will not rely on such a technicality.

It was my impression at that time that the reason for that exchange between the court and counsel was that we had said the Commission wanted to be particularly certain that it was respectful of the District Court's orders and that it not go forward until the District Court had entered its own order vacating the injunction even if that was in a sense a formality; and that we wanted the District Court's assistance in entering an injunction to protect against transfer of assets until that occurred, until the Commission could resume its own proceedings.

And the District Court Judge at that time was expressing reservation about whether the Commission (p. 13) needed to await any further order of the Court. Essentially it was taking the view that you were free to proceed now. And the question to counsel for ATN at that time was specifically to determine whether that technicality was something they will rely on. The inference I thought was that if they were going to rely on that the District Court might well consider entering an injunction against transfer of assets. And with the assurance of Mr. Berman that they will not rely on that technicality the District Court proceeded to dispose of the motion.

To the best of my recollection, both Mr. Prior and Mr. Prosser was in court when Mr. Berman made that representation that they will not rely on that technicality.

I have a understanding of the fact that Mr. Sheen—when you're co-counsel you can not determine everything about how legal proceedings are done. I think he is within his rights to rely on the wording of the motion.

My own advice to the Commission would be on the basis of those proceedings in District Court at the present time. The contention that it is improper for the Commission to go forward today is not persuasive and that you will be justified in going ahead.

And I think that the proceedings in front of the (p. 14) District Court yesterday are consistent with that. He specifically refused to enter an injunction to stop you from going ahead today. So whatever was to be argued in terms of impropriety of the Commission going forward, evidently was not sufficient to persuade the District Court that you shouldn't continue.

Mr. Sheen: Mr. Parrot, excuse me, may I respectful request a ruling on my request to have the written motion delivered to the court reporter to be incorporated and made a part of this record.

Mrs. Hodge: That's entirely proper, Mr. Chairman.

The Chairman: It shall be.

Mr. Rice: Do you want to give it a number, an exhibit number?

Mr. Sheen: No, sir, I'll just request that the Court Reporter rather than sit here and read the motion, simply have the Court Reporter incorporate it as part of the transcript.

Before The

VIRGIN ISLANDS PUBLIC SERVICES COMMISION
CHARLOTTE AMALIE, ST. THOMAS,
VIRGIN ISLANDS 00801

IN THE MATTER OF THE SALE)	PSC DOCKET
OF (p. 15) STOCK OF THE VIR-)	No. 301
GIN ISLANDS TELEPHONE)	ORDER NO.
CORPORATION)	29/1988

MOTION FOR POSTPONEMENT OF HEARING

The Virgin Islands Telephone Corporation ("Vitelco") and its parent, Atlantic Tele-network Co. (ATN"), hereby urge the Commisison to postpone the hearing in this matter, currently set for October 25, 1988, until the later of (a) the disposition by United States District Court for the Virgin Islands of both pending court cases concerning the Commisison' Order No. 22-1987, in the proceedings; or (b) ten (10) days after the Commission provides adequate notice of the subjects to be covered at the

hearing and the actions, if any, that the Commission proposes to take, as required by the United States Constitution and Virgin Islands law.

By Commission Order No. 29-1988 (the "Order"), received by Vitelco on October 13, 1988, further hearing in Docket 301 has been scheduled for October 25th. The Order states that "the Commission requires further testimony and argument before entering a final order . . . . ".

I.

The scheduled hearings are improper and premature. On April 23, 1987, the Commission entered Order No. (p. 16) 22-1987. On June 20, 1987, the Commission was enjoined by the District Court from approving, disapproving or imposing any conditions on the sale of Vitelco's stock to ATN. *ATN V. PSC*, District Court Civil No. 87-257. In lawful reliance on that Order, which the Commission did not seek to stay, ATN consummated its acquisition of Vitelco stock.

While the United States Court of Appeals for the Third Circuit has reversed the District Court's decision, the Third Circuit did not order the injunction dissolved, and ATN has appealed the Third Circuit's decision to the Supreme Court of the United States. The District Court's injunction against the PSC remains in effect. It is improper for the Commisison to act in any way contrary to the Court's still effective injunction.

It is also premature for the Commisison to consider this matter until *both* court cases concerning Order No. 22-1987, are decided. The issue in the first case (Civil

No. 8-257) was whether the PSC had authority to approve, disapprove or condition the sale. In responding to the Third Circuit's mandate, the District Court could well rule in a way that would affect the Commisison's further deliberation on that issue.

In any event, as the Third Circuit explicitly stated, that case did not involve a determination of the (p. 17) reasonableness of the specific conditions the Commission sought to impose in Order No. 22-1987. The District Court has been called upon to make just that determination (among others) in a separate case (Civil No. 87-347), which is a timely appeal from Order No. 22-1987, pursuant to 30 V.I.C. Section 34. The Court's decision in that separate case will plainly affect any further Commission deliberations in this proceeding. Indeed, under the rules of judicial review, the Commission may well be barred from taking any further action on the matter without first seeking permission of the Court to vacate Order No. 22-1987.

II.

The hearings should also be postponed to enable the Commission to provide adequate notice to Vitelco and a meaningful opportunity to prepare for the hearing as required by the Constitution and the Virgin Islands law. Section 22 of Title 30 of the Virgin Islands Code requires the Commission to give no less than ten (10) days notice of a hearing which might provide the basis for action affecting a utilty such as Vitelco. To be sure, Order No. 29-1988, scheduling hearings for October 25th, was received by Vitelco on October 13th. But the Order provides no indication of the topics concerning which the Commission re-

quires further testimony and (p. 18) argument or what action, if any, the Commission proposes to take based on that testimony or argument. The Order thus gives Vitelco no idea how to begin to prepare for the hearing.

The hearing cannot simply be a continuation of the ago. As the Commission itself recently argued to the United States District court for the Virgin Islands, there have been substantial changes in Vitelco's ownership and financing since the Commission last investigated the matter in April of 1987. *EG.*, Answer and Counterclaim of the Public Services Commission of the Virgin Islands, Civil No. 87-257, pp. 11-12. Thus, the facts that gave rise to the Commission's previous orders in this proceeding have changed, and there is no basis for assuming that the Commisison will now act in any particular way in light of the changed facts and circumstances.

Nor does the proposed testimony of Mr. Jameshed K. Madan, provide the needed notice. Mr. Madan's testimony was received by Vitelco on October 19, 1988, only four (4) business days before the hearing. Mr. Madan's testimony does not purport to be adopted by the Commission, and does not and cannot suffice to provide notice of the matters that the Commission proposes to consider or the actions, if any, that it might take as a (p. 19) result of the hearings. Indeed, Mr. Madan's testimony proceeds from the erorneous assumption that the PSC's investigation of the sale of Vitelco stock to ATN has been remanded to the Commission from the District court.

Mr. Madan's testimony also suggests that the Commission may have in mind adducing testimony concerning

whether events that occurred after the consummation of ATN's acquisition of Vitelco's stock should provide the basis for new or different conditions on Vitelco's relationship to ATN and its shareholders and to Vitelco's and ATN's debtholder. If this is what the Commission in fact intends, then the minimum ten (10) day notice required by 30 V.I.C. Section 22 is wholly inadequate to permit Vitelco to prepare for such a substantial undertaking involving significant matters and considerations that have, to this date, not been heard by the Commission.

WHEREFORE, for the foregoing reasons, the Commission should postpone the hearing scheduled for October 25th, until the late of (a) the disposition by the District Court of both pending cases concerning the Commission's Order No. 22-1987; or (b) a reasonable period after the Commission provides adequate notice of the subjects to be covered at the hearing and the actions, if any, that the Commission proposes to take.

(p. 20) DATED this 21st day of October, 1988.

Respectfully submitted,

VIRGIN ISLANDS TELEPHONE COMPANY
AND
ATLANTIC TELE-NETWORK COMPANY

BY: _____
ALBERT A. SHEEN, OF COUNSEL"

Mr. Hayes: One of the things that it seems to me that I heard in court yesterday from Judge O'Brien was that, that he judged these argument basically that are in this motion and that they are not valid. Were they valid we wouldn't be here this morning, he would have

issued a restraining order. And, it seems clear to me from my recollection of what happened and what he said was that if we were to accept this argument at this time that we are overruling what the Distrit Court Judge just said as recently as 24 hours ago. If not overruling it, ignoring it at our own peril. And it seems to me that there isn't any question of the reasonableness of us proceeding with this hearing at this time and I so move.

Mr. Adams: I second that motion.

(p. 21) The Chairman: It has been moved and it has been seconded. All in favor?

(Show of hands.)

(Unanimous)

The Chairman: The motion is carried and we will continue our hearing in Docket 301 as of this date.

Mrs. Hodge: Mr. Chairman, my view is that the most expeditious way to proceed is to call Mr. Madan who has done some analysis for you of what appears to be the contents of the transaction; and if we can call him now we can present his direct testimony officially.

The Chairman: Mr. Madan. Mr. Dorsett, will you please swear in Mr. Madan.

THEREUPON,

Jamshed K. Madan, being first duly sworn and testified as follows:

(Examination By Mrs. Hodge:)

Q. Will you state your full name for us, please.

A. My name is Jamshed K. Madan. My business address is 456 Main Street, Richfield, Connecticut.

Q. Mr. Madan, on behalf of the Public Services Commission have you prepared pre-filed testimony (p. 22) analyzing the terms of a purported sale of the stock of VITELCO by ITT to ATN?

A. Yes, I have.

Mr. Hodge: Mr. Chairman, may we assign an exhibit number to a copy of Mr. Madan's testimony for the record.

The Chairman: RC-1.

Mr. Rice: Mr. Chairman, we already—the latest one I can lay my hand on is RC-6. So this will be RC-7.

The Chairman: Yes, we pick up from where we left off.

Q. Do you have a copy here before you?

A. Yes, I do.

Q. Do you adopt and ratify this pre-filed testimony as your direct testimony in this phase of these proceedings?

A. Yes, it is.

Mrs. Hodge: Mr. Chairman, may we official make RC-7 a part of the evidenciary record in this docket?

The Chairman: So moved.

Mr. Adams: Second.

The Chairman: All in favor?

(Unanimous)

(p. 23) Mrs. Hodge: Mr. Chairman, I think Mr. Madan can now be made available for cross-examination.

Mr. Sheen: I have no questions of the witness.

The Chairman: Thank you, Mr. Sheen.

The Chairman: Any Commissioners, any questions. Give us a few moments, please.

Mr. Hayes: Mr. Madan, the first question I have is have you ever come to a hearing of a utility and there was no one there to cross-examine you as a witness?

A. No, I haven't, Mr. Chairman. I have had hearings in which attorneys have decided not to cross-examine me before, if that's your question. I believe Mr. Sheen said that he didn't have any questions. There has been other proceedings in which for whatever reasons attorneys have not cross-examined my testimony.

Mr. Hayes: I guess I was struck by the peculiarities of the hearing this morning in that VITELCO is represented by an attorney who really hasn't been in the hearings previously, there is this testimony here but nobody is here to ask you any (p. 24) questions about it. And I just wondered if this is anything that ever happened in your experience before?

A. I can't recall whether the exact same circumstances have occurred. Although the circumstance surrounding this proceedings have certainly been unique in my experience over 15, 17 years of regulation.

Mr. Hayes: And speaking of absences, one of the absences that keeps striking me all the way through is the absent of the creditor. In your research here, what

do we know about the people that have loaned them this 104 million dollars?

A. Mr. Chairman, as you recall the Commission basically instructed its rate counsel and staff sometime in the summer to, at the request of Mr. Prior to go ahead and have certain discussions and try and resolve various issues.

As part of those discussions we had requested financing documents. We had also requested access to the lender. Now as has been the trend with a lot of those discussions they seem to result in an initial contact between the designated representative of VITELCO and ATN with very little feedback and follow on. And with that particular contact, even though we requested a meeting with the Shearson people and the intial indication was that it would perhaps be a good idea, that has never come (p. 25) to pass.

So, for whatever reason, Shearson which owns forty-five percent which is not a controlling interest basically has not been present at these sessions and in addition, at the same initial meetings we requested to meet with the financial people, RTFC, and again for whatever reason that has not come to pass. So I can not comment on it anymore than to simple state the facts that we had requested in effect to meet with them and it was initially thought to be a good idea and it has just never come to pass.

To continue, if the Commission thought it would be useful, I'm not sure exactly what the procedure would be, I'm sure rate counsel will probably be in better posi-

tion to address that, but it perhaps would not be a bad idea to in effect attempt to have the financing people address the Commission at some point.

Mr. Hayes: Well, the question that keeps coming to my mind, early on when the Chicago Bank was involved in this they had three or four people here all the time. When E. F. Hutton was here there were always several of those people. I wasn't thinking of Shearson so much as I was thinking of whatever these other initials are in Nebraska that put up the 104 million dollars.

(p. 26) We have got a docket going on here that it seems to me that could conceivably have some effect on that loan of 104 million dollars and yet I have not seen anybody from that office that has given this money here. And I don't suppose there's anything bad to be drawn from that but, it certainly, it surprises me. I don't understand the vacuum of interest here.

In my business experience I have never known a creditor to loan money and not be interested in what is happening to the money or what the debtor is doing with it and in this case whatever information the creditor has here has got to be secondhand because there has been no firsthand information from the Commission or even this area as far as we can tell.

A. Mr. Chairman, we have obviously a confused situation here as to what the appropriate jurisdiction of this Commission is. I believe ATN and VITELCO think it is one thing and perhaps the Commission will think it different. You're going into a question of strategy which quite frankly I don't feel competent to testify on as to

why they are doing it. It is simply a decision that Mr. Prior and Mr. Prosser seems to collectively have made.

I can tell you that in other proceeding in which the financing is critical, I can think of one offhand which (p. 27) would be as very well kind of publicized one which you probably heard of with the accident at Three-Mile Island. When we were testifying on that and determining what the rate consequences of that incident was, a group of banks that provided the revolving credit agreement were regular participants before the Commission in those proceedings. The information was critical in terms of the future status and certainly if they choose to testify we would sit and listen to what they had to say.

It is really up to them to decide whether they choose to come before you and they will have the burden or presenting whatever evidence they thought was appropriate at this time.

But we do have the financing documents. I have covered in my testimony what some of the conditions that are contained in those documents that are very substantially different to your initial order setting down conditions which is I think one of the key points we are making in this proceeding is that things are very very different to the time that a lot of the initial attempts in this docket were made. There was testimony taken, there was certain negotiations tried early on and this financing came to light well beyond early representations made by VITELCO and ATN.

What I have attempted to do in this testimony is to (p. 28) highlight for you which I'm sure you're well

aware of, a lot of the differences that have occurred. The assumption of debt, the assumption of the guarantee, the combining of the coverage ratios for ATN and VITELCO in total which I believe are very detrimental. In other words, even though you can have a healthy VITELCO you can well have a unhealthy ATN and we have of course seen representations by Mr. Prior on the stand that when that situation occurs protection of ATN seems to be as important a consideration for example as employment. And those are the kinds of things that I have been trying to point out to you.

So, what I have done in my testimony is point those things out. We do have the documents. We know what they say and I have made a series of recommendations as to which particular clauses, which particular important clauses amongst those documents ought to be amended.

If it was your pleasure to consider alternate of conditions which I understand is only one of the avenues open to you, my understanding from counsel is that the Commission has broad discretion based on the Third Circuit decision. There's a wide range of options which this Commission can follow. They are stated very clearly in a footnote in that decision and I'm not prejudging which particular option you all will choose, that's (p. 29) clearly your function, that's up to the Commission.

What I have laid out are the conditions in certain of these financing documents which I believe at an absolute minimum need to be addressed. If that is the route you choose. If you choose other routes the whole question of conditions become moot.

Mr. Hayes: My question wasn't to elicit from you any judgment of strategies on their behalf. It was more to, I have a feeling that the actions of this whole thing, the loan and that sort of thing that there has been nobody here to explain it to us or to—except as done by Mr. Prior and he gave us some explanations that I thought were peculiar when there's a—and one of the peculiar ones as I recall was limit on interest of 10 percent, that said there was a ceiling of ten percent but he testified that that didn't mean anything.

And so, I just wondered if am I unusually apprehensive on this thing or is this a common way for people who loan money not to appear to explain anything?

A. I'm not sure there's anything I would characterize as a common way. Each case has its own circumstances and again not to avoid the question, I certainly think it might have been helpful if ATN and VITELCO and the lender chose to come.

(p. 30) Again, I'm not that familiar with the exact procedural details in terms of if the lender itself could initiate an appearance before this Commission without in effect having VITELCO sponsor that particular party as an individual. It might be an interested party and if it chose it could then appear by itself which has happened in certain proceedings which I'm familiar with. I have seen the whole broad spectrum and it certainly would not have been unusual and I'm sure the Commission would have welcomed their testimony.

It was not available other than through VITELCO and the actual loan documents for which they speak. I

have seen references by certain members in the press when they have board meetings. I believe one of the members of RTFC either sits on either the ATN board or VI-TELCO board and has suggsted publicly in the press that they get together with the Commission. But other than those press releases I can certainly say from a staff standpoint nobody has contacted staff to make any such presentation.

Mr. Hayes: Well, it is clear from your testimony and other things that we know that the situation that exists today is much different from the situation that existed on our April 87 order. And that the order that we put out at that time is not appropriate or in any significant way to cover the (p. 31) situation.

A. Commissioner Hayes I think that true. If you look at my testimony beginning on page eight; eight and nine basically states those things which I believe were in effect in contradiction to your order number 22-87 specifically number one was the use of the holding company. Number two it was consummated without an irrevocable letter of credit or any equity contribution. Number three was your condition, as you recall, that there were millions of dollars, I can't remember the number, somewhere between 14 and 17 million dollars of fees and other arrangements that had to be paid just to consummate the financing which would be to Mr. Blankeneau (phon), it would be to E. F. Hutton which was a substantial receipt of a lot of those fees. Up in the area of 14 to 16 million dollars.

That there was a very specific section in your order stating that prior commitments made by ATN officers be respected and those were not.

And there was also a requirement that employment contracts and inter-company transactions be scrutinized which they weren't. As you recall Mr. Prosser signed these agreements on behalf of ATN and VITELCO both.

And beginning on page ten are the conditions in the financing and those are basically as you can see there is (p. 32) the first one is where VITELCO was obligated not only for its 60 million dollars of debt but an additional forty-four million dollars of debt which the owners of ATN required VITELCO to guarantee and this was the cause of a lot of concern in the rate proceeding. In other words, this is the area where if VITELCO is healthy and ATN isn't, since ATN owns all of VITELCO and owns all of its management, basically can impose certain conditions that can make it intolerable for VITELCO.

Section 108 of the loan agreement talks about how ATN and VITELCO would join together for purposes, and of course this is the situation that we have been hearing about where if again the situation for VITELCO is okay but for ATN isn't, one hears talk of bankruptcy, et cetera.

Number three, is the question of investment in the lender. There was approximately ten percent of investment required which would be approximately ten point four million dollars. ATN unilaterally decided that this investment come entirely from VITELCO which purchased the ten point four million dollars of what is called the subordinated capital certificates. ATN was required to invest zero. In other words, it was a lopsided arrangement.

Six point zero five of the loan agreement talks (p. 33) about the interest coverage ratios and debt service coverage ratios, again showing that ATN and VITELCO are inextricable linked in their operations and, therefore, you can not have one healthy unit and another unhealthy unit.

Section 706 indicates that VITELCO couldn't take on additional debt other than in very limited circumstances which we did not believe was in the interest of VITELCO.

Section 9.01 of the loan agreement talks about the rights and remedies of the lender saying that if there is a default in either VITELCO or ATN, that in effect the lender can call a default and take certain actions with regard to ownership, et cetera, which we believe were not in the interest of the Virgin Islands.

Section 3.15 of the mortgage and security agreement had this condition whereby future chief executive officers and chief operating officers of VITELCO, a local Virgin Islands operating unit, in other words the chief officer had to be approved by the lender in case there was any change and our recommendation of that was that it was an intolerable condition.

So I think in those pages we list both of what they did in violation of your original order and then all the conditions that they imposed subsequent, that were new and need to be taken into consideration by this (p. 34) Commission in its deliberations.

And basically the last chapter of my testimony deals with the issues that I recommend are before you for con-

sideration. That begins on page 14 of my testimony and basically goes through the end of my testimony.

The first area is the condition that were imposed by the financing in the amount of the loan and I believe you're familiar with that, it is if the amount of the loan is excessive leverage by VITELCO to an intolerable kind position.

The second issue on page 16 was the holding company structure which ATN has been using to say that the Commission has no jurisdiction over certain operations and was specifically prohibited by the Commission in terms of the consummation of the sale originally.

The third broad issue deals with inter-company contracts which has been a problem. As you recall in the rate proceedings ATN took the position that is is entitled to 6 percent of the gross revenue of VITELCO without any particular showing of services or benefits received. In addition, there was the whole question of the rate case expenses and how those were paid, et cetera. Those were all part of this inter-company contract issue.

The fourth question was the management of VITELCO (p. 35) which I believe you all had various evidence on in the rate proceeding showing the average experience of a similar set of independent companies that Mr. Prior identified in his testimony and we called up these companies and presented to you an exhibit showing that each one of these chief executive officers had long extensive experience in operating a public utility. So that was an issue.

There was a specific issue of representations made by ATN to the Commission as you recall that originally in your deliberations the original owners of ATN made certain representations and in my discussions with VITELCO and ATN certain of those representations were disavowed because of the holding that initially the District Court felt the PSC didn't have jurisdiction, therefore, I believe it was VITELCO's position that in effect those original hearings made before you did not even occur.

So these again are the representations. This is a pretty important one as you recall because this deals with the representation originally made to the Commission and Senator Redfield that employment contracts will be kept in place for three years.

And you know, we have had some kind of testimony recently as to Mr. Prior position on the employment (p. 36) situation. And of course we have the fact that Mr. Basford is no longer the chief operating officer, the president of VITELCO.

The other issue is the cost associated with the transaction. There's a philosophical issue as to whether when somebody comes before you to consummate a transaction and as a result of that you have an increase in cost, a substantial increase of one million dollars in terms of insurance costs that this automatically be passed through and that this issue be looked at in the overall context as to whether these insurance costs first of all were appropriate, were treated at arms length and the details behind them be known. And even if they were, whether a party coming in to consume a transaction if it results in substantial additional cost to a telephone company and

a request be made that it be passed on automatically to the ratepayers, as to whether this transaction is in the public good. There is no reason philosophically why the ratepayers of the Virgin Islands should automatically pay one million dollars more in telephone charges because somebody else wants to own the telephone company.

Then there was the question of ownership and the question of additional shares and changes in ownership. I believe that the Commission addressed this recently (p. 37) saying that any change in either ATN or VITELCO or any change in ownership between the Shearson position which we understood for the first time through testimony of Mr. Prior or change in the individual ownership of Mr. Prior and Mr. Prosser would be an issue that the Commisssion needed to be notified on and would require Commission approval.

We then talked about in the remaining portion of my testimony the issues of the emergency system, the life line system which from a staff point of view appears to be no reason in the world why these important, in one of them life saving services should in any way be held hostage to these proceedings. It seems to me that those should proceed, VITELCO made offers in public in the summer that they will be willing to implement the 911 system in the context of rate stability plan. Why is it linked to a rate stability plan when this is a life saving service. I'm not sure.

In addition, the life line plan which I can report to you has been docketed by this Commission. Any number of States—I get industry publications and publications

just every month are updating additional States which have implemented life line. I believe the last count the number is somewhere between twenty and 30 days States have implemented substantial life line programs and to (p. 38) make it very specific these would be be reduced cost telephone service available to a targeted segment, usually the poor, the handicap and the indigent.

In my original testimony in 301 I indicated that very favorable rates perhaps $12.00, perhaps even less than $10.00 could be made available to this very needy group of Virgin Islanders which we attempted to negotiate back in January and again that this issue becomes hostage to this particular situation. There is no conceptual link between the implementation of these very needed programs for the Virgin Islands and the issue that is before you at this time. It seems to me that those issues should proceed immediately. There's no reason in the world to hold those hostage. Nine-one-one is a life saving system, why it is being held back is not at all clear and I believe it should proceed immediately.

As I understand your deliberations as soon as the final order in 316 is issued the Commission will order VITELCO to go ahead and implement these two plans. Until such time we will just have to wait and see.

Mr. Hayes: Mr. Madan, the conditions that were outlined in the original order that had been so cavalierly set aside and changed, I don't think it is a matter of ego with the Commission that we go back and say they have to do this sort of (p. 39) thing, but, it is a, it seems to me, a matter of need for the ratepayer of the Virgin Islands that that type of protection that those various conditions

provided to the local community have to be in place. And I don't mean that we had a cement casting there that had to be followed. But we had a series of protections for the ratepayer and as far as that we can see here they have all been cast aside and the only consideration has been for the people who have bought this company. Their interests are the only ones that appear to be at all important here.

And, I feel that it is incumbent upon the Commission to get back to a situation where the ratepayers of the Virgin Islands has got some protection. I don't think it is of any concern of the Commission who owns the telephone company. What the concern of the Commission is the community and the ratepayers. And this business of someone owning the telephone company and then expecting the ratepayers to buy it for them is entirely wrong.

So, though on paper we have got a number of options here it seems to me that that the actions of the present owners of VITELCO are rapidly narrowing our options and our ability to protect the community. They are going to force us to do something on this or they have forced us to do something on it. That is my feeling. I don't (p. 40) think the status quo can continue and I think the path that we will be forced to take, that is is the offices of ATN that are drawing it for us.

Mrs. Hodge: I don't mean to interrupt if other Commissioners have questions, but I did have one question that I would like to ask Mr. Madan if appropriate at this time, Mr. Chairman.

The Chairman: Yes, sure go ahead.

(By Mrs. Hodge:)

Q. Mr. Madan, in your pre-filed testimony you made reference in your discussion of minimum conditions for improved transactions to your ongoing concerns about a holding company structure involving ATN as a parent of VITELCO if ATN is involved in other transactions particularly where it appears that VITELCO is the only asset of value in the overall structure. There was testimony, if I recall correctly either in Docket 314 or Docket 316 from Mr. Prior to the effect that ATN was looking into the possibility of acquiring a telephone company in Trinidad. If the holding company structure as presented in this transaction were retained and ATN were to acquire it, another major caribbean telephone company like Trinidad as they suggested to the Commission they might be planning to do; and if they did so once again as (p. 41) they did in the case of VITELCO essentially with one hundred percent debt financing, in your opinion would there be any substantial risk to VITELCO in the event that there were for example a natural catastrophy in Trinidad that cause damage to a substantial amount of that?

A. I think there would be. And obviously it will depend on the terms of the agreement and how good the agreement was. A natural catastrophy might even be inadequacy of rates in Trinidad. If all of a sudden you found a telephone operating company with a changed political environment where the telephone company didn't receive as favorable a treatment or wasn't protected as well, in effect depending on the circumstance you would have an even more highly leverage situation where the impact on one island could impact on another.

So not only with a telephone company but any transaction in which ATN is pyramiding more than what it already has which is 104 million dollars debt on a total asset value of approximately 60 million dollars which is already substantially in excess, to go ahead and borrow further on the strength of the U.S. Virgin Islands and VITELCO in particular would be a cause of great concern to this Commission and would need to be looked at very carefully.

(p. 42) That was very very clearly one of the original propositions that was the stumbling block which took ATN to originally seek a ruling from the District Court where it felt that the Commission couldn't impose any conditions and certainly not any unreasonabble ones. And very much the original issue with regard to the holding company was, one was access of information which has been extremely problematical and secondly the issue of ATN to go ahead and pyramid additional debt which is of concern to the Commission and ratepayers of the Virgin Islands and protection of VITELCO assets.

To the extent you create a subsidiary of ATN rather than a subsidiary of VITELCO, ATN takes the position—for example VITELCOM a perfect example, that that subsidiary is not under the jurisdiction of this Commission. Whereas if VITELCOM was a subsidiary of VITELCO, a utility, my understanding from counsel is that access to books and records and information is set forth very clearly in the code and that this Commission would have absolute and complete access to this kind of information.

So, I would state again that there's a series of reasonings, one of which is the financing and the jeopardy an dthe second one is the assets and creation of the subsidiary question which is of great concern with regard to the issue of the holding company. And if ATN (p. 43) is proceeding with financing a telephone company it would seem to me that the order issued by the Commission just very recently should gain us another legal interpretation but a financial interpretation would prohibit any such transaction. I believe that was the financial intent of the Commission's decision. The legal intent I'll leave to rate counsel.

Mrs. Hodge: That is all, Mr. Chairman.

Mr. Adams: Mr. Chairman, may be have a short recess.

The Chairman: At this time, we will recess for 15 minutes.

(Recess)

The Chairman: Back on the record, Do you have anymore questions for Mr. Madan.

Mrs. Hodge: No.

The Chairman: Mr. Madan, I have questions in reference to the property at Havensight. Do you recall the value that was given of that property in the original contract of sale?

The Witness: Mr. Chairman, my recollection is that the testimony was that it had a book value of around one hundred thousand dollars as I recall from memory and

that the last appraisal done a (p. 44) couple years ago was in the million dollars or plus range.

The Chairman: Wasn't that property also mortgaged when they received the loan from RTFC?

The Witness: I believe it was. I believe all properties as a general rule.

The Chairman: All properties they owned outright?

The Witness: Mr. Prior said if anything was missed it would be a miracle. Everything was basically mortgaged that he could think of. That's what his testimony was before the Commission.

The Chairman: And the recent sale of the property was one hundred thousand dollars?

The Witness: No, no, the book value was one hundred thousand dollars. As I understand it, there has been no quote unquote sale. There has been a transfers from VITELCO to VITELCOM. There's some question in my mind as to exactly the validity of that transfer. I believe the Commission has kept open that docket because you all had testimony in the rate proceeding suggesting that some alternative kind of treatment be made and I believe the most recent order (p. 45) prohibits a further sale of the property from VITELCOM to any other third party. That's my understanding of that that order. Again, I'll need a legal interpretation. But that's my understanding of the order.

So, I don't know whether that property is up for sale or not. But my understanding is that the order of the Commission does not basically allow a further sale of that property.

The Chairman: Well, I was at a Rotary meeting one particular day about three or four weeks ago and the question, the new president was introduced as of today he's the president of VITELCOM, a completely new business?

The Witness: Billy Shoddy?

The Chairman: Yes.

The Witness: I think they testified to that extent that they have set up this subsidiary and again that subsidiary of course appears to have been created even after the Third Circuit decision which allowed the Commission to set conditions. Obviously it hadn't been remanded back to the Commission but from a timing standpoint that took place even after the Third Circuit decision. And that subsidiary is in whatever state is is, is considered to be legal or not and I'm no expert on that.

(p. 46) It certainly violates the Commission conditions as to whether it should have been created or not.

The Chairman: The book value when it was transferred was one hundred thousand dollars?

The Witness: That's my understanding, sir.

The Chairman: I think that is rather strange because the property adjacent to it two years ago which was about a quater of the size sold for nine hundred thousand dollars with far less structures on it.

The Witness: Yes.

The Chairman: We hear just rumor to the effect if VITELCO transferred that from one person or another

why would a realtor be involved? I'm not asking for a legal opinion; in general.

The Witness: From a practical standpoint transfers of properties from one subsidiary to another, I, at least from my experience, I have never seen any realtors involved in those types of transactions.

I have been involved in any number of proceeding with the breakup of telephone companies, divestiture for example. I have been involved in other proceedings (p. 47) involving transfer of directory properties from an operating company to another subsidiary and to the best of my recollection as long it is still within the umbrella of the parent there should be no reason for any realtor to be involved. It will make no sense. It is just additional cost without any particular purpose that I can see.

The Chairman: I thought it was rather strange because the realtor that was involved was the wife of Senator Magras and we understand that there was a Commission paid for that transfer. Just rumor, nothing in fact.

The Witness: I have no way of knowing whether that.

The Chairman: I thought maybe you had seen something in checking the records of VITELCO.

The Witness: No, I don't believe we have actually looked into that. I believe rate counsel has been assigned agent to pursue the matter further.

I personally have not come across any formal papers or anything to indicate. We didn't have access to any of that stuff in the rate proceeding.

The Chairman: Yes.

(p. 48) Mr. Hayes: Mr. Madan, in the September 30th Commercial Reporter on St. Croix, there's an item in there that says supplement to mortgage and it is by the V. I. Telephone Corporation and it would look like it is all of VITELCO's property on St. Croix. My question is: are you aware of any change in the mortgage status or what the significant of this would be or is?

The Witness: Mr. Hayes, again we are not in an active information gathering stage at this point. Your orders on 314 and 316 are all but final. So, no, I'm not really—really not aware of that. And I'll have to look at the document and basically be instructed by you to go ahead and talk to VITELCO and pursue whatever information you all sort to gather. I'll be happy to do that but at this time outside of the context of the rate proceeding I don't have any particular authority to look into that other than the general surveillance of the Commission.

Mr. Hayes: That was really my question, I wondered if it had come up in any of your conversations with them?

The Witness: No.

Mr. Hayes: My curiosity is what is still turning in the financial side of this (p. 49) company. This doesn't describe anything except as a supplement to the mortgage and it has no dollar amount?

The Witness: And there are no officers here from ATN or VITELCO to answer that question. But if it is your desire I can certainly with your authority go ahead and pursue that if you wished.

Mr. Hayes: I don't think it need be a specific duty at this time. I would think it would be part of some ongoing investigation as we go through with it. It should come out.

The Chairman: Mr. Adams.

Mr. Adams: Mr. Chairman, my concerns were addressed when I found out that there was a hearing in St. Croix yesterday. I knew of it before and then I heard of the cancellation. I didn't know it was rescheduled and held. So I was kind of surprised this morning when I heard about that. That's why I asked for the break so that I could be briefed on it. Now I'm satisfied.

The Chairman: Good, thank you. Mr. Rivera.

Mr. Rivera: No questions.

Ms. Sewer: No questions.

The Chairman: No further questions. Mr. Sheen.

(p. 50) Mr. Sheen: I have nothing to address, sir.

Mrs. Hodge: That is all we have for Mr. Madan at this time, Mr. Chairman.

I believe that that would represent the staff's analysis of the matters pending before you in Docket 301 and that the next step would be appropriate from a procedural schedule would be to now call on VITELCO and/or ATN to call any witnesses they may wish to offer on this matter.

Mr. Sheen: Mr. Chairman, I respectfully request, as a I have in my motion, that no decision be taken today on what is before the Commission. And further I respectfully request that VITELCO and ATN be given an op-

portunity to make a presentation before this body prior to any decision being taken on Docket 301. Thank you.

Mr. Hayes: Counsel, could you tell us why ATN or VITELCO is not prepared day.

Mr. Sheen: Well, I believe we have outlined that, Mr. Hayes, in our petition or motion for postponement of this hearing. We will like an opportunity to respond to Mr. Madan's testimony. It was received last week. We have not had sufficient opportunity to address it. We would like the Commission (p. 51) to exercise the discretion which it has to extend the time within which you make a decision, to extend the time for the purposes of taking testimony, to extend the time to give VITELCO and ATN an opportunity to present evidence on the matter which is before you today.

Mr. Hayes: Well, I don't quite understand the argument. If when the law was written that there was a reason for putting a 10 day period in there as being a reasonable period why does it suddenly become unreasonable. It was more than 10 days, I think you said 13 or 14 days. It—now it is not reasonable. Should we go back to the legislature and get the law changed to make it some longer period. What is so difficult—is this case unique and particularly difficult?

Mr. Sheen: Mr. Hayes, I guess for a number of reasons it would be improper for me to engage in a legal argument with you as to what steps would be appropriate with respect to the notice requirement as it now stands. I think it will be improper for me to do so for a number of reasons.

I stand on my request and respectfully ask that you act favorable on it.

Mr. Hayes: You give us no reason to act favorable on it. If ten days is what (p. 52) the law allows and the simple statement that it isn't long enough doesn't seem to be a reason to change it. There should be a reason on the table as to why this is unreasonable.

Mrs. Hodge: Mr. Chairman, the only thing I can think of that may be appropriate here is to request that the record reflect that which I believe to be true which is that it appears that there's no one present with Mr. Sheen either as a witness for VITELCO or as a witness for ATN. So that we are not in a position to summon any witness forth to testify for you.

I also would like to note for the record that yesterday afternoon when we were in St. Croix before the District Court in relation to the motion advanced by ATN for a preliminary injunction to postpone this hearing that both Mr. Prosser and Mr. Prior were present for that hearing. So, I'll infer from that, that they are in the territory.

The Commission obviously is in a position to decide the motion for a continuance, it has initially at this hearing once declined to grant the motion. I gather from Mr. Sheen that he wishes to renew the motion. It is appropriate for the Chairman to rule on the renewed request for an adjournment.

If the Chair determines not to grant the adjournment (p. 53) we will also note that present today is Mr. Derrick Samuelson whom I believe is an attorney representing ITT.

I would like the record to reflect that ITT has not officially been served with an order to show cause in this proceeding in relation to whether the Commission may or may not approve the sale. But he is present and may wish to address the Commission on matters relating to this docket.

And also present is Samuel Sugden, whom I believe is here in relation to an item of correspondence which reached the Commission this morning which may be viewed as having some relevance to this docket.

But I'll say that from the point of view of your schedule today that the Commission probably through the Chair should next take up Mr. Sheen's renewed motion for adjournment.

Mr. Adams: Mr. Chairman, I move that the motion for postponement of the hearing as it is stated here be rejected by the Commission.

The Chairman: We have a motion that the postponement be denied. Do we have a second?

Mr. Rivera: I'll second the motion.

The Chairman: We have a (p. 54) second that the postponement be denied. All in favor?

(Chorus of ayes.)

The Chairman: It is carried unanimously.

Okay, Mrs. Hodge.

Mrs. Hodge: Mr. Chairman, having offered VITELCO and ATN an opportunity to call witnesses, having denied the renewed motion for adjournment it will be appropriate for the Chair at this point to conclude the pre-

sentation of testimony by Atlantic and VITELCO and to offer an opportunity, if desired, to counsel for ITT to present any remarks he may wish to address to the Commission.

The Chairman: Thank you. Mr. Sheen.

Mr. Sheen: For ITT.

The Chairman: I'm sorry.

Mrs. Hodge: No, I actually meant the Chair may wish to offer Mr. Sheen one last opportunity to address the Commission.

The Chairman: That's what I thought.

Mrs. Hodge: On behalf of VITELCO and ATN. If he has nothing further to offer on behalf of those parties, it will be appropriate for the (p. 55) Chair to close the record as to their participation and to offer an opportunity, if desired, to the attorney for ITT.

The Chairman: Mr. Sheen.

Mr. Sheen: I have nothing further, Mr. Chairman.

The Chairman: May have a motion to close the record on that?

Mr. Hayes: I so move that the hearing so far as the presentation from the parties previously participating be closed or is closed.

Mr. Adams: Seconded.

The Chairman: It has been seconded. Any discussion? All in favor.

(Chorus of ayes.)

The Chairman: The motion is carried.

(Unanimous.)

The Chairman: Mr. Samuelson.

Mr. Samuelson: I'm Derrick Samuelson with ITT. I hadn't planned to make any statement today. But I would say if the Commission were to go in the direction of a rescission that we would wish to make a formal presentation before there were any (p. 56) decision reached.

Our concern would be that after this length of time since the company was sold to the present owners that there certainly are many changes in the way the company is run, the way it is financed. There are probably a number of operational matters that we will have no reason to be aware of. And, therefore, on technical grounds we will have to investigate exactly what had happened to the company and on what terms we might take it back. Although unwilling basically to take it back.

And I say that because we have largely disbanded our tele-communiccation business. The support system which we used to have in operation in San Juan, Puerto Rico, and in Secaucas, New Jersey have largely disappeared. We have sold other companies generally in tele-communications and we are in process of selling more.

So, when we originally decided to sell this business we were getting out of the telephone business, it was our last telephone company and we are still getting out of other types of tele-communications businesses.

So if we were forced despite our concerns to take the company back and assuming one could technically reach

a conclusion as to what it is worth today we will immediately put it up for resale. Because we have no (p. 57) interest in continuing to own it.

So, those are our thoughts informally expressed to you today and as I said before if the Commission decides to proceed further in this direction or to understand what our detailed concerns might be we will be willing to present them to you in a more formal way.

The Chairman: Thank you, sir.

Mr. Sudgen.

Mr. Sugden: Mr. Chairman, I have here today with Mr. Samuelson on behalf of ITT but also on behalf of another group, an investor group that I believe you perceived a letter from called Coral Communications.

I'm really here as a observer and I want to make it very clear that anything that Coral Communications has to put forward is only in the event the Commission and VITELCO do not satisfy—the conditions are not satisfied. In other words, the letter, Mr. Chairman, which you received came from the president of Coral Communications which included a copy of a written offer which was made to Mr. Prior last week. And which pursuant to your own order the president of Coral Communications thought it was incumbent upon him to let you know.

(p. 58) I'm here to answer any questions that I might be able to.

The Chairman: Thank you, sir. Any questions to Sugden.

Mr. Sugden, are you at liberty to tell us some of the members of your board of directors?

The Witness: Let me tell you about the investor group and it is an investor group. It clearly would not manage the day-to-day operations of the telephone company.

The investor group is as stated in the letter has the financial support of Citicorp. The investor group is composed principally of the owners of a different investor group called Silverscreen. Silverscreen has been in existence for four or five years and has been in the business of raising equity money through limited partnerships, principally for Walt Disney, and in that function has been able in the last, I guess four years to raise approximately one point two billion dollars of equity money for Disneyland.

So these are experienced investors and Mr. Steven Davis is president of Coral Communications is also a part of the investor group. He's a former partner of mine at LeBoeuf Lamb and has elected to leave the law firm and become a businessman.

(p. 59) Mr. Hayes: ITT has asked to be offered the opportunity to present its case in the case or in the situation where we vote for rescission. Coral Communications, I guess—would Coral Communications be presenting anything at that time too?

Mr. Sugden: Surely.

Mr. Hayes: You're working with ATN at this time?

The Witness: Yes, that's correct.

Mr. Hayes: But you also clearly have some affiliation or connection—

The Witness: With ITT, absolutely.

Mr. Hayes: So that Coral Communications really is a bridge between the two of them?

The Witness: Only if ATN is willing.

Mr. Hayes: I see. But were we to proceed through or to continue this hearing to make some partial decision and continue the hearing so that ITT can make the presentation that they have asked for this morning, at that time perhaps we will have a better idea of what Coral Communications—

(p. 60) The Witness: Coral Communications would be delighted to tell you more about itself, more about its intentions. I probably can answer quite a few questions here today. But, to have a representative of Citicorp down here, to demonstrate to you their intentions and to have the principals down here also.

Mr. Hayes: Well, from your background and experience in this, you know what the concerns of the Public Services Commission were?

The Witness: I certainly do.

Mr. Hayes: In this buy out and why the unusual circumstances came about where the Commission would be concerned as to who owned the utility which ordinarily shouldn't be our thing.

So, with your knowledge and background of that, would Coral Communications, whatever finally came out of it, would they satisfy the requirements that the Public Services Commission placed on the original sale of this, that's basically the requirements that the ratepayers—

The Witness: Mr. Hayes, I think so. And I'm quite deliberately not giving you an unqualified yes because frankly I have not been involved with VITELCO since January. I'm not aware of everything (p. 61) that has gone on since then. The kind of conditions that you were talking about before then, yes.

Mr. Hayes: That's what I'm talking about. Because we haven't put any other conditions on since then. It is just as you have seen. Whatever conditions we did place on it have been completely ignored and almost in every case the opposite.

The Witness: I'll say this, that if we were to reach agreement with ATN and we could not satisfy the conditions the Commission had then the transaction would not go through. There's absolutely no intention of trying to do anything that is inconsistent with the conditions which the Commission feels are appropriate at this time.

I'm deeply aware that VITELCO is a regulated company and it must respond to the Commission.

Mr. Hayes: The conditions that the public Service Commission put on this sale or attempted to impose on this sale were only conditions that, in our opinion, would protect the community and the ratepayers here. And we really have no interest as to who owns VITELCO.

So, the individual owners are of no consequence. But we do want assurance that our concerns of financial stability in the future, and that sort of thing will be (p. 62) addressed and that the ratepayers won't be put at risk with hair brain schemes or other island purchases?

The Witness: I understand that.

Mrs. Hodge: I have a couple of questions, if I may, Mr. Chairman.

The Chairman: Yes.

(By Mrs. Hodge:)

Q. Mr. Sugden, given the fact that you have had some working with the Commission in the past including some earlier stages of Commission investigations into VITELCO proposed sale as well as its rate setting, I would assume that the group that you were providing advice to would come into a possible acquisition of this sort with its eyes pretty much wide open. May I ask you, preliminarily and not intending to elicit formal legal commitments, is Coral Communications in its discussions with the owners of ATN generally aware of the fact that the Commission has been interested in seeing that 911 service is offered to the people of the Virgin Islands as soon as possible?

A. Yes.

Q. And also that the Commission is interested in seeing that life line service is made available to needy members of the community as soon as possible?

(p. 63) A. Yes.

Q. Are the investors in Coral Communications generally aware of the fact that the Commission has been interested in insuring that there be stability in employment?

A. Yes.

Q. And I see in the letter you sent the Commission an indication that your major financial partner or a major

financial partner in the transaction is Citicorp, the nation's largest holding bank company. Are your investors and Citicorp aware of the Commission's interest in insuring that VITELCO have a reasonable debt equity ratio?

A. They are very much aware, yes, and the Commission will be well aware of what the equity ratio is going to be prior to the time that any transaction is consummated and if that was satisfactory then so be it. And if it was not it would either be revised or the deal would not be consummated.

I'm also aware of Mr. Madan's suggestion, I believe that 15 percent equity ratio be a minimum at a start. And I believe, although I don't want to commit at this stage, that that probably could be worked out.

Q. You also were involved in an early phase of some Commission review of the telephone companies general (p. 64) rates and will recall that there was a point at which there were discussions about negotiating what I'll for purposes of this proceedings call reasonable rate reductions. Are the principals of Coral Communications aware of the fact that the Commission has been engaged in rate proceedings and is looking into the possibility of rate reductions for the people of the Virgin Islands?

A. They are aware of it. They recognize that principally because of the 1986 Tax Act that rates should be reduced and they understand that and accept it.

Q. I take it from the fact that you supplied the Commission a letter from your client to Mr. Prior and not a response that the group that you are representing is

initiating communications with the present owners of ATN but not reached a stage at which there's a joint proposal that you and ATN would present to the Commission?

A. That's absolutely correct. And I believe the meeting that was had with Mr. Prior on Friday of last week was the second meeting that they have had and it was the first time that a written offer had been conveyed to him.

Q. In your letter to the Commission I also noticed a reference to the fact that if Coral was to make this acquisition it is envisioned that VITELCO's day-to-day operation will be conducted with individuals with (p. 65) experience in running telephone companies, is that a fair description?

A. Absolutely true.

Q. May we ask you to assure the Commission at this time that if your discussions with ATN go forward further and your client and ATN reach a point at which it appears there's a serious prospect for an agreement between you that the Commission be kept advised of that?

A. I think the letter that was sent to the Chairman is evidence of our intention to do that. Of course we intend to keep the Commission aware of each and every step.

Q. Would you be in a position to tell the Commission whether to the best of your knowledge the investors in Coral Communications would generally be agreeable to the concept of the Public Services Commission reviewing and having jurisdiction over the transactions of VITELCO and its parent in their dealings in the Virgin Islands?

A. We expect that, yes. And however the transaction, if it is to happen, however it is constructed I believe, we believe, Coral believes that the Commission has jurisdiction over the entire transaction.

Mrs. Hodge: That's all I (p. 66) have for Sugden, Mr. Chairman.

The Chairman: Mr. Sugden, if this transaction came about, would Mr. Basford be retained as president of VITELCO?

A. Mr. Chairman, I have had no discussions with Mr. Basford. I of course have known Mr. Basford for many years and have great respect for him. And he certainly fulfills the criterior of being an experienced operating telephone man. But I think for me to go any further it would probably be inappropriate at this time.

The Chairman: I think it would be the opinion of this Commission and the people of the Virgin Islands that he be retained. Because he's an excellent person in that position, in my opinion.

Mr. Hayes: I'd just like to say it is awful good to see Mr. Sugden down here again. Though we have argued many times in the past it has always been on—

Mr. Sugden: Always respectful.

Mr. Adams: I'm sure Mr. Sugden will remember that when he came back into the picture at one time I was very happy to see him back. So it is on record where I stand where that's concerned.

Mr. Sugden: Thank you.

(p. 67) The Chairman: I think that speaks for all of us.

Mr. Hayes: That doesn't mean we are going to make it any easier for you?

Mr. Sugden: I don't expect it.

The Chairman: Anything further.

Mrs. Hodge: Mr. Chairman, at this point, I'll suggest that it will be appropriate for the Commission to consider whether it wants to enter any order in this docket, either in response to Mr. Samuelson's request that ITT be given an opportunity to appear before you formally if the Commission's inclination is to pursue the possible remedy of rescission or otherwise to address the merits of the matter before you on the basis of the testimony that you have heard.

The Chairman: Thank you, Mr. Sugden.

Mr. Hayes: I'll make a motion in general terms, that—I'll make a motion that the Public Services Commission order that the sale of VITELCO from ITT to ATN be rescinded but, that we not make that final until we have heard from all parties (p. 68) involved, particularly ITT and ATN so that—perhaps the order should be that it is our intent to rescind it and that we are asking to show cause why we should not.

The exact wording I'll like counsel to give us because I think an order such as that is pretty important that is be worded correctly.

But, I think that perhaps what my motion is, is it the consensus of the Commission. We may have overlooked something.

The Chairman: We have a motion before us, do we have a second to it?

Ms. Sewer: I second it.

Mr. Adams: I would want some discussion.

The Chairman: Discussion.

Mr. Adams: It is my understanding in yesterday's hearing Judge O'Brien indicated that he'll take prompt action to proceed and give the Commission the direction that the Third Circuit court had ordered when it wa remanded back to the District Court.

So, since that is presumably coming up soon, I think we should actually wait and see, get Judge O'Brien's order and then proceed when we receive that.

Mr. Hayes: Is that—

(p. 69) Mrs. Hodge: Are you referring to the order that is contemplated from the District Court that will vacate the injunction officially?

Mr. Adams: Yes.

Mrs. Hodge: I think that order is actually anticipated from Judge Christian. And is anticipated relatively soon. Judge O'Brien gave us to understand that he erpected Judge Christian to enter that order himself and he thought it will be entered soon.

If the substance of your suggestion is that the Commission would want to enter a conditional order and defer its final decision until after that order from the District Court is received I can develop wording to do that. If the gist of your suggestion that you prefer not to take

any action, even conditional action until after that order is actually in hand, then I think probably your correct procedural step today would just be adjournment.

Mr. Adams: I was under the impression that Judge O'Brien made the statement that the order would be coming forthwith, within a very short time.

Mrs. Hodge: He told us that he anticipated Judge Christian would enter his order (p. 70) very soon particularly since it is my understanding that Judge Christian will only be officially sitting for about another week.

So, since he told us that Judge Christian will be entering the order and since the Judge will be on the bench only another week he told us he expected the order would be entered soon. If by any chance Judge Christian is occupied with other matters and does not reach that order within the time remaining of his tenure on the bench then I assume Judge O'Brien will enter the order.

What Judge O'Brien told us that he'll reach promptly is the disposition of another case that is pending which is the appeal, which I think is in relation to the petition to reconsider order 22-1987. But I'm not really sure that that need detain you in relation to this motion.

What that really addresses is a different issue.

Mr. Hayes: I think the purpose of my motion is to let all parties be aware of the Public Services Commission intent and tentative decision on this subject to information that ITT or somebody else could bring to us that we haven't heard before.

We have evidently heard all that ATN is going to give us on this, but ITT has asked us for something (p. 71) more. They may have some other information.

But, it is my feeling that what has developed from the hearings has been a clarification of a situation that is so different from that, that we had anticipated the sale of VITELCO to develop into and a situation where the risk to the local ratepayers in the community is so great as to be unacceptable and that the only people than can straighten this out are the people that got us in the mess, that's the people that originally developed it. That's ATN and ITT has got to get back together and work out a different way of doing this.

And I'm optimistic that there's a way to get through it. This will eventually be a lot better for everyone.

Mr. Adams: I have no further discussion. I'm ready to proceed with the vote.

The Chairman: Mrs. Hodge, you see any problem with Commissioner Hayes—

Mrs. Hodge: Well, if I have understood it correctly the motion essentially is to the effect that the Commission having conducted its hearing and heard all the testimony offered today finds, at least preliminarily on that evidence, that a rescission of the sale is warranted in order to comply with the concerns of the Commission which originally caused the opening of this docket, mainly to insure the (p. 72) financial stability of the utility and its ability to provide reasonable service at reasonable rates to the ratepayers. But that it wishes to give to ITT the requested opportunity to be heard and that the procedure

contemplated is a order to show cause directed to ITT if it has any reason why rescission should not be ordered.

If I understand it correctly there's no procedural problems with an order of that kind.

The Chairman: We have the motion. It has been seconded.

All in favor.

(Chorus of ayes.)

(Unanimous.)

The Chairman: It is carried.

So Mrs. Hodge you will prepare the order for us.

Mrs. Hodge: Yes, Mr. Chairman.

Shall we consider a date for the order to show cause or do you want the Executive Director to fix that subsequently?

Mr. Hayes: The question came up, the other party is ATN. But, it seem to me ATN has given us all the testimony they wanted to in this case.

(p. 73) Mrs. Hodge: You have the right in your discretion to make the order to show cause addressed only to ITT since you have already had a hearing which ATN was given an opportunity to be heard or you have the discretion to make the order to show cause addressable both to ITT and ATN whichever the Commission deems appropriate.

Mr. Hayes: I hesitate to open it up to ATN again. The only people that—because this is incredible. They

have evidently don't want to tell us anything. And I think we will just get ourselves in another legal morass or delaying tactics. The only other people who I'm not clear if we are overlooking is the creditors of ATN, whoever they be.

Mrs. Hodge: There's no question that the lender who has been described to you in rate proceedings has a direct stake in several aspects of this transaction. The fact that they entered into those loan agreements without communication with the PSC and at a time when they were on notice of the fact that there was litigation pending whether the sale was valid may put them in a position in which their rights are somewhat less than they might otherwise be, but it certainly would not be inappropriate if the Commission wanted to do so to also issue the order to show cause to the lender (p. 74) giving it an opportunity to if it chose to exercise it, to appear and be heard in relation to a proposed decision.

Mr. Hayes: My only concern is that anybody who might be hurt with this or affected by it know about it. So if ATN has had their opportunity, so that people maybe affected by it would be ITT and whatever this other acronym is in Nebraska or wherever.

Now, does the show cause require them to respond?

Mrs. Hodge: Yes. It gives them an opportunity to go forward and offer any testimony that is relevant to the issue but essentially it opens it up for their affirmative showing.

Mr. Hayes: But they don't have to respond?

Mrs. Hodge: They don't have to, that is correct.

Mr. Hayes: Then I'll request from the Commission that my motion be modified to include the creditor.

The Chairman: Do I have a second?

Mr. Adams: I second it.

The Chairman: Any (p. 75) discussion. No discussion.

All in favor?

(Chorus of ayes.)
(Unanimous.)

The Chairman: The motion will show that the creditor will be included in our order.

Mrs. Hodge: I had left the question lingering whether the Commission wanted to pick a date now for the order to show cause or wanted the Executive Director to schedule it subsequently.

The Chairman: Would the time frame be the same as far as 10 days is concerned?

Mrs. Hodge: I think actually especially if you're going to give notice to the lender for the first time you might want to allow a little more than ten days to make sure the notice gets to them and so on.

The Chairman: November 21, that is okay with everyone.

The Chairman: Is there anything further on this docket.

Mr. Rice, you have anything to add?

Mr. Rice: No, sir.

The Chairman: Nothing (p. 76) further to add in 301, at this time we will adjourn.

All in favor.

(Chorus of Ayes.)

Certified true and correct.

/s/ Theodore A. Dorsett
THEODORE A. DORSETT, CM

EXHIBIT III

PUBLIC SERVICES COMMISSION
P.O. Box 40
Charlotte Amalio, St. Thomas, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE SALE OF STOCK OF THE VIRGIN ISLANDS TELEPHONE CORPORATION	) PSC DOCKET NO. 301) ORDER NO. 31/1988

The above-captioned matter came on for hearing before the Virgin Islands Public Services Commission (hereinafter "Commission") on October 25, 1988 at 10:00 A.M. Present for the Commission were all regular members of the Commission, the Commission's counsel Maria Tankenson Hodge, the Executive Director, Patrick Rice, and Jamshed Madan of Georgetown Consulting Group. Also present were Albert Sheen, Esquire, counsel for the Virgin Islands Telephone Corporation (hereinafter "Vitelco") and Atlantic Tele-Network Company (hereinafter "ATN"), Derrick Samuelson, Assistant General Counsel for International Telephone and Telegraph Corp. (hereinafter "ITT") and Samuel Sudgen, Esquire, representing ITT and Coral Communications, Inc.

The Commission convened the hearing and heard the direct testimony of Jamshed Madan, together with supplemental questions addressed by members of the Commission. He was then made available for cross-examination to counsel for Vitelco and ATN. After counsel indicated he had no cross-examination for the witness, there was no further testimony on the matter of sale of stock between ITT and ATN offered by the Commission's con-

sultants, and counsel for Vitelco and ATN having indicated he had no testimony to offer, the evidentiary record was ordered closed.

Counsel for ITT then addressed the Commission indicating the desire of ITT to make a formal presentation, if the Commission should determine that rescission of the sale was warranted with particular reference to the need to determine the value of the corporation as it would stand at the time of rescission and other matters of concern to the seller.

Counsel for Coral Communications referred to a letter to the Commission expressing the interest of Coral in acquiring the stock of ATN. Said letter was made a part of the record. Mr. Sugden assurred the Commission that any proposed acquisition of ATN by Coral would be made consistent with the Commission's role as the regulatory body supervising the public utilities in the territory.

On the basis of all the testimony adduced consisting entirely of the testimony of Mr. Madan, which was neither impeached by cross-examination nor contradicted on any point by any other witness, the Commission determined that rescission of the sale of Vitelco stock by ITT to ATN was necessary, inasmuch as the terms on which the transaction had taken place, as described in some detail in the testimony of Mr. Madan and the closing documents submitted to him for review, were inconsistent with the financial stability and integrity of the utility and the ability of the utility on an ongoing basis to provide adequate service at reasonable rates.

In particular, Mr. Madan testified, without contradiction, after analysis of the financing and conduct asso-

ciated with the sale of Vitelco's stock, that the restrictions imposed upon Vitelco through financing were onerous and not in the best interests of Vitelco in providing safe and adequate service to its ratepayers. He further testified as to the aspects of the transaction which were inconsistent with the utility's ability to provide safe and adequate service, including the fact that ATN has unconditionally obligated Vitelco to be responsible for $60 millon dollars of debt, secured by mortgages on all Vitelco real property, and then remitted almost in total to ATN as a dividend. ATN also caused Vitelco to guarantee, without apparent compensation, an additional $44.4 million dollars in debt undertaken by ATN for the purchase, thereby converting Vitelco from an almost 100% equity-financed entity to an almost 100% debt-burdened corporation, solely for the purpose of financing the purchase of stock which had not benefited Vitelco in any respect.

Mr. Madan pointed out a number of covenants in the loan agreement which substantially restrict the ability of Vitelco to conduct its own affairs, to determine its own revenue requirements, to pick its own executives, and to borrow funds if needed for its own purposes, and he concluded on the basis of this detailed analysis that the terms of acquisition actually entered into by ATN, would have been a violation of Order 22/1987 had the court's injunction not been in place; and indeed are *more* detrimental to Vitelco than the original terms of acquisition proposed to the Commission in 1987.

Further, he noted the utility had been caused to enter into a contract with a related party namely, ATN, the new owner, for advisory services, which we have previously

indicated we consider totally inconsistent with Vitelco's welfare, and without any evidence that the six percent (6%) gross revenues paid to ATN produces anything approaching equivalent value. This is particularly objectionable because it is apparent that ATN caused the agreement to be signed on behalf of the utility by an ATN principal without prior Vitelco board review, immediately at the time of closing, and without any identifiable purpose other than to extract large amounts of revenue from the public utility.

Moreover, immediately after closing experienced management was replaced with inexperienced officers whose only qualification for the position was their ownership interest in ATN, clearly a detriment to Vitelco.

The Commission having concluded that all of Mr. Madan's testimony was credible and persuasive, adopts his analysis as the findings of the Commission in addition to the foregoing. Also, we conclude that the terms of Order 22/1987 can have no ongoing application in relation to a transaction which was consummated on terms entirely different from those presented to the Commission at the time of that order, and therefore direct that Order 22/1987 be superceded by this order.

AND IT IS HEREBY FURTHER ORDERED that the sale of stock of the Virgin Islands Telephone Corporation by ITT to ATN shall be rescinded, provided, however, that ITT Corp and Rural Telephone Financing Corporation may show cause, if any there be, on November 21, 1988 at 10:00 A.M., at the Buena Vista Room of the Bluebeards Castle Hotel, why the transaction should not be rescinded, or if rescission proceeds, what terms and con-

ditions would be appropriate to include in a final order to implement such rescission, including without limitation any necessary and appropriate provisions to assure the parties to the transaction that the value of the stock as returned is equal to the value of the stock as conveyed, or to permit the parties an opportunity to verify and confirm the value of the stock as it would be returned and thereby to determine the appropriate sum to be remitted by the seller to the buyer as part of the rescission. Any party proposing to appear and show cause at the hearing above-scheduled shall pre-file, in writing, with the Commission, not less than five (5) days prior thereto, such party's direct testimony, and shall cause of copy thereof to be served upon counsel for the Commission, and all other parties.

In connection with this order of rescission, the Commission further orders that, if an appropriate request to approve another proposed sale of Vitelco's stock by ITT to ATN or any other prospective purchaser is to be presented to the Commission, it shall be submitted with sufficient detail in advance of proposed closing, to permit the proposed terms of sale to be reviewed by the Commission in conformity with the provisions of Title 30 of the Virgin Islands Code.

During the pendency of this order the provisions of Order Nos. 28/1988 and 29/1988 shall be in all respects complied with.

DATED: 11/10/88

/s/ George C. Parrott
GEORGE C. PARROTT, Chairman

Copies sent by Registered Mail and by Telefax transmission to:

Virgin Islands Telephone Corporation (VITELCO)
Atlantic Tele-Network Company (ATN)
International Telephone and Telegraph Corp. (ITT)
Rural Telephone Financing Corp. (RTFC)

EXHIBIT IV

ARTHUR ANDERSEN & CO.

ATLANTIC TELE-NETWORK CO.
(Parent company only)

FINANCIAL STATEMENTS
AS OF DECEMBER 31, 1987
TOGETHER WITH AUDITOR'S REPORT

ARTHUR ANDERSEN & CO.
Chicago, Illinois

To the Board of Directors of

Atlantic Tele-Network Co.:

We have examined the balance sheet of ATLANTIC TELE-NETWORK CO. ("the Company") (parent company only) (a Virgin Islands corporation) as of December 31, 1987, and the related statements of income, retained earnings and cash flows for the period from June 25, 1987 (date of inception), to December 31, 1987. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

As set forth in Note 2 to the financial statements, as a result of a decision of the United States Court of Appeals, the Virgin Islands Public Service Commission could impose various conditions on the Company's continued ownership of Virgin Islands Telephone Corporation. In the opinion of management, any fines or other conditions imposed will not have a material effect on the financial statements.

In our opinion, the financial statements referred to above present fairly the financial position of Atlantic Tele-Network Co. (parent company only) as of December 31, 1987, and the results of its operations and its cash flows for the period from June 25, 1987 (date of inception), to December 31, 1987, in conformity with generally accepted accounting principles.

April 8, 1988

ATLANTIC TELE-NETWORK CO.

(Parent company only)

BALANCE SHEET—DECEMBER 31, 1987

(In thousands)

ASSETS

CURRENT ASSETS:	
Cash	$ 375
Consulting fees receivable	43
Due from subsidiary (Note 3)	1,560
	$ 1,978
FIXED ASSETS:	
Land	$ 124
Investment in subsidiary (Note 3)	49,046
	$49,170
DEFERRED ASSETS (Note 9):	
Debt issuance cost	$ 3,085
Organization costs	455
	$ 3,540
Total assets	$54,688

LIABILITIES AND STOCKHOLDERS' EQUITY	
CURRENT LIABILITIES:	
Current portion of long-term debt	$ 814
Accounts payable	2,360
	$ 3,174
LONG-TERM DEBT (Note 8)	43,630
Total liabilities	$46,804
STOCKHOLDERS' EQUITY:	
Common stock	$ 20
Additional paid-in capital	2,980
Retained earnings	4,884
Total stockholders' equity	$ 7,884
Total liabilities and stockholders' equity	$54,688

The accompanying notes to financial statements are an integral part of this statement.

ATLANTIC TELE-NETWORK CO.

(Parent company only)

STATEMENT OF INCOME
FOR THE PERIOD FROM JUNE 25, 1987
(DATE OF INCEPTION), TO DECEMBER 31, 1987

(In thousands)

REVENUES:	
Advisory fees	$ 1,627
Consulting fees	43
Total revenues	$ 1,670

EXPENSES:	
Legal, consulting and management expense	$ 80
Amortization of organization costs (Note 9)	51
Amortization of excess of purchase price over underlying book value (Note 1)	614
Interest expense, including amortization of debt issuance cost of $235	6,383
Total expenses	$ 7,128
Loss before taxes	$(5,458)
INCOME TAX EFFECT OF PARENT COMPANY OPERATIONS (Note 4)	1,811
Net loss before equity in earnings of subsidiary	$(3,647)
EQUITY IN EARNINGS OF SUBSIDIARY (Note 3)	8,531
NET INCOME	$ 4,884

The accompanying notes to financial statements are an integral part of this statement.

ATLANTIC TELE-NETWORK CO.

(Parent company only)

STATEMENT OF RETAINED EARNINGS FOR THE PERIOD FROM JUNE 25, 1987 (DATE OF INCEPTION), TO DECEMBER 31, 1987

(In thousands)

BALANCE, beginning of period	$ —
Add—Net income	4,884
BALANCE, end of period	$4,884

The accompanying notes to financial statements are an integral part of this statement.

ATLANTIC TELE-NETWORK CO.

(Parent company only)

STATEMENT OF CASH FLOWS
FOR THE PERIOD FROM JUNE 25, 1987 (DATE OF INCEPTION), TO DECEMBER 31, 1987

(In thousands)

CASH FLOWS FROM OPERATING ACTIVITIES:	
Net income	$ 4,884
Add (deduct)—Adjustments to reconcile net income to net cash provided by operating activities—	
Amortization of excess of purchase price over underlying book value	614
Amortization of organization costs	51
Consulting fees receivable	(43)
Due from subsidiary	(1,560)
Accounts payable	2,360
Organization costs	(506)
Deferred debt issuance costs	(3,085)
Net cash flows from operating activities	$ 2,715
CASH FLOWS FROM INVESTING ACTIVITIES:	
Land	$ (124)
Investment in Vitelco	(49,660)
Net cash flows from investing activities	$(49,784)
CASH FLOWS FROM FINANCING ACTIVITIES:	
Issuance of debt	$ 44,444
Issuance of common stock	3,000

Net cash flows from financing activities	$ 47,444
Net increase in cash	$ 375
CASH AT BEGINNING OF PERIOD	—
CASH AT END OF PERIOD	$ 375

The accompanying notes to financial statements are an integral part of this statement.

ATLANTIC TELE-NETWORK CO.

(Parent company only)

NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 1987

(1) GENERAL:

Atlantic Tele-Network Co. ("ATN" or the "Company") is a U. S. Virgin Islands corporation formed on June 24, 1987. The Company acquired all of the outstanding common stock of the Virgin Islands Telephone Corporation ("Vitelco") from ITT Communications Services, Inc. ("ITT") effective June 25, 1987, in a business combination accounted for as a purchase. The total cost of the acquisition was $41,298,000, over the underlying book value of Vitelco. Such excess is being amortized on the straight-line method over 35 years.

Vitelco is primarily engaged in providing telecommunications service in the U. S. Virgin Islands.

(2) ACQUISITION LITIGATION:

The purchase referred to in Note 1 is being contested by the Virgin Islands Public Service Commission ("VIPSC").

On April 23, 1987, the VIPSC issued an order disapproving the then-proposed sale of Vitelco's stock from ITT Communications Services, Inc. to ATN unless certain conditions were met. On June 19, 1987, in an action brought by ATN, the United States District Court for the Virgin Islands (the "District Court") held that the VIPSC did not have statutory authority to approve, disapprove or condition the sale of Vitelco's stock. On June 24, 1987, the sale of Vitelco's stock to ATN was consummated without ATN's or Vitelco's complying fully with the conditions in the VIPSC order. The District Court formally entered an injunction prohibiting the VIPSC from interfering with the sale on July 7, 1987.

On March 10, 1988, the United States Court of Appeals for the Third Circuit (the "Third Circuit") handed down a decision reversing the District Court and holding that the VIPSC had statutory authority to impose conditions on the sale of Vitelco's stock. The Court also suggested, but did not hold, that the VIPSC could seek to rescind the sale or impose fines on Vitelco or ATN for consummating the sale in violation of the VIPSC order.

ATN has timely sought rehearing of the Third Circuit's decision, the effect of which is therefore stayed until ATN's rehearing request is determined. If the Third Circuit denies ATN's rehearing request, it is expected that the VIPSC will seek remand of the matter from the District Court to the VIPSC for consideration of the action, if any, that it should take in light of the fact that ATN has consummated its acquisition of Vitelco's stock and has obtained new and different financing, as described in Note 8.

On August 13, 1987, while the above-described action was pending in the Third Circuit, ATN and Vitelco appealed to the District Court for review of the VIPSC order on other grounds. That appeal has been held in abeyance pending the resolution of the Third Circuit as described above. If the Third Circuit does not grant its rehearing petition, ATN intends vigorously to contest the VIPSC order before the District Court.

Under the circumstances, ATN and its attorneys believe it unlikely that VIPSC will require outright rescission of ATN's acquisition of Vitelco's stock. Neither the VIPSC staff nor the VIPSC itself has formally or informally proposed specific fines or conditions or identified what remedies, if any, it will pursue if Vitelco does not comply with any conditions the VIPSC may ultimately impose. However, in the opinion of ATN and its attorneys, any fines imposed would be limited by statute to $100 per day. Furthermore, in the opinion of the Company, other conditions or remedies ultimately specified will not have a material effect on the financial statements.

(3) SIGNIFICANT ACCOUNTING POLICIES:

Basis of Presentation—

The accounting policies of ATN conform to generally accepted accounting principles. The financial statements have been prepared following the equity method of accounting, and, as such, the statement of income reflects the Company's equity in the earnings of Vitelco since the date of acquisition.

Investment in Subsidiary—

ATN's investment in all of the outstanding common stock of Vitelco, based on the equity method of accounting

at December 31, 1987, consists of the following (in thousands):

Paid to ITT Communication Services Inc. for purchase of common stock	$87,428
Acquisition costs	6,686
Distribution from Vitelco	(52,985)
Earnings of Vitelco from date of inception to December 31, 1987	8,531
Amortization of excess of purchase price over underlying book value	(614)
Investment in Vitelco	$49,046

The earnings of Vitelco from date of inception to December 31, 1987, consist of the following (in thousands):

Local telephone service revenues	$ 8,763
Toll service and access charge revenues	16,913
Miscellaneous	2,341
Total operating revenues	$28,017
Depreciation and amortization	$ 3,453
Taxes, other than income taxes	1,341
Other operating expenses	10,797
Other (income) deductions, net	(299)
Total expenses	$15,292
Income before income taxes	$12,725
Income taxes	4,194
Net income	$ 8,531

Revenue of Vitelco—

Vitelco's revenue consists of local service and access charges which are recognized when earned, regardless of the period in which they are billed.

Access charges are billed by Vitelco to the long-distance carriers. These charges are for interconnection with local facilities and for end-user charges to multiline business, single-line business, and residential customers for access to long-distance facilities.

Access revenue are recorded on the basis of estimated allocations of plant and operating expenses to long-distance service. These estimates are subject to review by the National Exchange Carriers Association ("NECA"). The years 1986 and 1987 are still open for such review. The FCC has ruled that the authorized rate of return which exchange carriers (such as Vitelco) may earn for providing interstate access service is 12% for 1987 and 1988. In management's opinion, subsequent adjustments resulting from the NECA review and the FCC limits on the authorized rate of return will not significantly affect the accompanying financial statements.

Due to uncertainties included in the review and settlement process, only a portion of such estimated access revenues is recorded as revenues, and the remainder is recorded as a current liability.

During 1987, subsequent to its acquisition by ATN, Vitelco concluded negotiations with AT&T and NECA with respect to the period 1984 and 1985 and refined its estimates for 1986. As a result, net revenues for such periods were increased in excess of those previously re-

flected in prior years by approximately $7,006,000. This amount has been included in the Company's equity in the earnings of Vitelco on the accompanying financial statements.

(4) TAXES:

ATN and its subsidiary will file tax returns covering the period from inception through December 31, 1987.

Deferred income taxes are provided for timing differences, principally due to the use of accelerated depreciation for income tax purposes. Accumulated deferred taxes are credited to income as the related timing differences reverse.

Investment tax credits related to regulated telephone operations have been deferred and are being amortized to income over the service lives of the related property. Investment tax credits applicable to other operations are used to reduce income tax expense currently, or in the year when such operations are no longer regulated.

Total income tax expense above divided by the sum of such tax expense and net income results in effective income tax rates of 32.8% for the period from June 25, 1987, to December 31, 1987. The following table reconciles the weighted statutory income tax rate (including the 10% Virgin Islands surcharge) to these effective income tax rates:

Statutory income tax rate	37.4%
Amortization of investment tax credit	(9.0)
Amortization of cost in excess of underlying book value not deductible for tax purposes	8.5

Other	(4.1)
Effective income tax rate	32.8%

In December, 1987, the Financial Accounting Standards Board ("FASB") issued Statement No. 96, "Accounting for Income Taxes," which supersedes previous income tax accounting standards and pronouncements. ATN is required to adopt the new accounting and disclosure rules no later than 1989, although earlier implementation is permitted. ATN has no decided when it will adopt the new standard. ATN is currently analyzing the provisions of FASB No. 96 and the effect that the change will have on the ATN's reported consolidated financial position and results of operations.

(5) RETIREMENT PLANS:

Vitelco has computed its pension cost in accordance with Statement of Financial Accounting Standards No. 87, "Employers' Accounting for Pensions."

Vitelco has a noncontributory plan for eligible hourly employees. Net periodic pension cost for the period from inception to December 31, 1987, was (in thousands):

Service cost	$ 44
Interest on projected benefit obligation	45
Actual return on assets	(119)
Net amortization and deferral	64
Net periodic pension cost	$ 34

The following table sets forth the funded status, the amounts recognized in the consolidated balance sheet of

Vitelco at December 31, 1987, and the principal assumptions of Vitelco's plan (in thousands):

Actuarial present value of benefit obligations—	
Vested benefits	$ 970
Nonvested benefits	223
Projected benefit obligation	$1,193
Plan assets at fair market value	1,323
Plan assets in excess of projected obligation	$ 130
Unrecognized net loss	10
Unrecognized prior service cost	103
Unrecognized net asset at January 1, 1987	(267)
Pension liability included in the balance sheet	$ (24)
Weighted average discount rate	8.50%
Expected rate of return on invested assets	9.75%

Until ATN acquired Vitelco in June, Vitelco participated in the ITT Salaried Retirement Plan. Subsequent to the acquisition, Vitelco's salaried employees will be included in the Company's management pension plan. ATN has not yet finalized its management pension plan, but the plan will be structured similar to Vitelco's plan with ITT. ATN's equity in the earnings of Vitelco includes approximately $175,000 of pension expense in the accompanying

financial statements related to the estimated costs of the plan for the period from June 25, 1987, to December 31, 1987.

(6) REGULATORY MATTERS:

In 1987, the VIPSC instituted a surveillance proceeding to determine whether Vitelco was earning in excess of its last allowed rate of return. The VIPSC staff submitted various reports to the VIPSC concluding that Vitelco's 1986 and 1987 earnings on local telephone service exceeded its authorized rate of return and recommending a $1.545 million reduction, based on 1986 earnings, in Vitelco's local telephone rates over a twelve-month period commencing on November 1, 1987. Based on estimated 1987 earnings, the VIPSC staff recommended an immediate rate reduction of up to $2.452 million. Hearings were held between September, 1987, and February, 1988.

Although the VIPSC has not issued any decision with respect to such proceeding, Vitelco believes that it is earning less than its allowed rate of return and, accordingly, no downward adjustment in rates is appropriate. However, the Company cannot predict what the VIPSC decision will be or ascertain at this stage of the proceeding the amount, if any, or the duration of reductions that the VIPSC will seek.

The Company believes that any refunds ordered for the period November 1 to December 31, 1987, would not be material to the Company's financial statements. Furthermore, ATN and its attorneys believe that there is a substantial possibility that a VIPSC order reducing

Vitelco' rates by the amount recommended by the VIPSC staff would not be sustained on appeal to the District Court.

During 1987, the VIPSC issued everal orders ordering Vitelco to pay assessments totaling $175,000 to cover certain VIPSC expenses and has petitioned for reconsideration of the VIPSC orders and/or petitioned for appeal to the District Court. Vitelco intends to contest the matter vigorously, and ATN and its attorneys believe that there is a substantial possibility that the District Court will invalidate the VIPSC orders.

No amounts have been accrued for such assessments at December 31, 1987. In February, 1988, Vitelco paid $75,000 under protest and with full reservation of its rights to challenge the lawfulness of the order imposing the assessment.

On March 4, 1988, the VIPSC ordered Vitelco to pay an additional assessment of $75,000. Vitelco has not paid the assessment and intends to contest the matter vigorously, and plans to submit a timely petition for appeal to the District Court. The Company and its attorneys believe that there is a substantial possibility that the District Court will invalidate the VIPSC order.

In October, 1987, Vitelco petitioned for an increase in revenues of approximately $3,500,000 on an annual basis. The VIPSC has docketed the petition, but no hearings have been held to date.

Effective January 1, 1987, the VIPSC detariffed customer premises equipment ("CPE"), and the Company transferred its CPE and the related accumulated depre-

ciation and deferred taxes to investment in nonregulated facilities.

The FCC has adopted a new Uniform System of Accounts ("USOA") effective January 1, 1988. The new USOA requires certain costs, which were previously capitalized, to be expensed. It is anticipated that this change will increase 1988 expenses by approximately $700,000.

(7) RELATED-PARTY TRANSACTIONS:

Under the terms of an agreement between ATN and Vitelco, ATN provides technical, professional and financial advice to Vitelco for a fee equal to 6% of Vitelco's total operating revenue. In addition, the agreement calls for reimbursement to ATN for any salaries and expenses of ATN employees while performing services for Vitelco. Total payments received under this agreement amounted to $1,627,000 in 1987. In Vitelco's last rate case, the VIPSC limited the percentage recoverable by Vitelco in local service revenues for such advisory services to 1% to 1½% of local operating revenues.

In addition, the advisory contract calls for Vitelco to reimburse ATN for salaries and expenses of the Company's employees who perform services directly for Vitelco.

In connection with the acquisition referred to in Note 1, $4,147,000 was paid to affiliated companies of the new stockholders for services rendered in connection with the acquisition. Such amounts are classified in the financial statements as investment in subsidiary ($2,192,000), organization cost ($75,000) and, debt issuance cost ($1,880,000).

During the period from June 25, 1987, to December 29, 1987, the Company entered into a bridge loan of $94,000,000 at a variable interest rate from an affiliate of a stockholder. Vitelco did not guarantee payment of either principal or interest on the bridge loan. Total interest expense reflected in the statement of income includes $6,129,000 applicable to such bridge loans and $235,000 of debt issuance expense related to the bridge loan. The Company believes that $235,000 of debt issuance expense represents a fair allocation of the total costs of acquisition to the bridge loan. The bridge loan was replaced on December 30, 1987, by the permanent financing described in Note 8.

Other than the above, net of amortization, there were no material related-party transactions.

(8) LONG-TERM DEBT:

On December 30, 1987, Vitelco borrowed $60,000,000 from the Rural Telephone Finance Cooperative ("RTFC"). As part of the same transaction, ATN borrowed $44,444,444 from the RTFC. The notes are to be repaid quarterly through December 30, 2002. The notes bear interest at a variable or fixed rate, as provided for in the note, at the lender's option. The interest rate at December 31, 1987, was 7.83%.

The loan and related agreements state that all of the assets of ATN and Vitelco are pledged on both ATN and Vitelco debt. In addition, Vitelco guarantees payment of interest and principal on the loan to ATN. At December 31, 1987, the ability of ATN to service its debt was solely dependent on funds from Vitelco.

The annual requirements for principal payments on long-term debt for the years 1988 through 1992 are as follows:

	Vitelco Amount	ATN Amount
1988	$3,013,408	$ 814,425
1989	3,255,618	880,101
1990	3,518,935	951,063
1991	3,806,665	1,027,738
1992	4,109,170	1,110,615

As a condition of receiving the loan, Vitelco was required to invest $10,444,444 in a subordinated capital certificate with the RTFC. This certificate is noninterest bearing but is entitled to share proportionately in the net earnings of RTFC.

(9) DEFERRED ASSETS:

The debt issuance cost at December 31, 1987, is applicable to the long-term debt and is being amortized on the basis of debt outstanding over the life of the debt.

Organization cost is being amortized over a five-year period beginning at June 25, 1987.